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SYMPOSIUM ON MISSISSIPPI EVIDENCE—PART II

OPINION AND EXPERT TESTIMONY
Reginald A. Gray, Jr. and S. Robert Hammond, Jr.

THE ENIGMA OF HEARSAY
Kenneth W. Barton and Richard G. Cowart

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CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS
Thomas D. Bourdeaux and Charles C. Pearce

VOLUME 49 MARCH 1978 NUMBER 1

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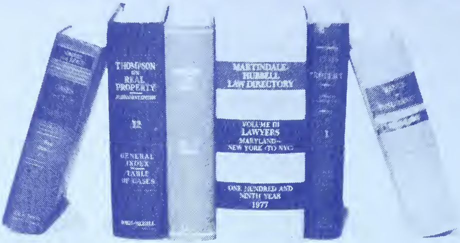
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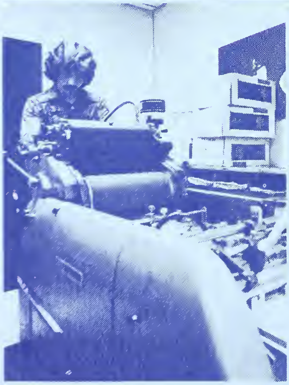

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OPINION AND EXPERT TESTIMONY

*Reginald A. Gray, Jr.**
*S. Robert Hammond, Jr.***

The purpose of this Article is to review and analyze the status of lay and expert testimony under Article VII of the Federal Rules of Evidence and to compare and contrast the federal rules to the existing rules of admissibility of opinion and expert testimony in the state courts of Mississippi. It is hoped that this examination will clearly define the parameters of the rules that will be encountered by Mississippi attorneys. Because the Federal Rules of Evidence were implemented relatively recently, very little case authority has developed at the appellate level. Any resulting limitations, however, are mitigated by the fact that prior to their adoption, the rules were frequently relied upon as representative of forthcoming, if not controlling, principles.[1]

The Advisory Committee, judicial, and legislative histories of Article VII are distinguished by the Article's exceptional noncontroversiality. Although it provides for expanded and liberalized admission of opinion testimony, the final Advisory Committee draft was not significantly altered at any stage of its subsequent judicial and legislative review and refinement.[2] It appears, then, that the principles embodied in Article VII were accepted with singular unanimity. It is probable that the absence of challenge to these principles indicates the compelling need for such an enactment. Moreover, the federal rules will probably exert great influence on local practice, regardless of whether the various states elect to adopt formally the federal principles as state law.[3]

The six rules found in Article VII, which have equal application in civil and criminal federal proceedings, provide the organizational format for the Article. Article VII deals with opinion evidence elicited from two sources—lay and expert witnesses. Rule 701, concerned with opinion testimony by lay witnesses, will be considered separately. Rules 702,

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[1] *See, e.g.*, Hing Lee v. Gray, 456 F.2d 1276, 1277 (3d Cir. 1972) (citing proposed rules for the proposition that lay opinion testimony is permissible to explain the cause of an automobile accident).

[2] 11 MOORE'S FEDERAL PRACTICE § 700.01, at VII-1 (2d ed. 1976). None of the rules in Article VII was the subject of floor debate in Congress. 3 WEINSTEIN'S EVIDENCE 701-1, 702-1, 703-1, 704-1, 705-1 & 706-2 (1976). The only changes made were minor ones adjusting terminology, *e.g.*, changing "judge" to "court." *Id.* at 705-1 & 706-2.

[3] As of July 1, 1977, at least ten states had adopted evidence codes based on the Federal Rules of Evidence. [1977] FED. R. EVID. NEWS 77-41 (Callaghan & Co.).

703 and 705 relate specifically to testimony by experts and will be considered together for convenience and clarity. Rule 704, concerning the admissibility of opinions embracing an ultimate issue for the trier of fact, and rule 706, providing for court appointment of experts, will be considered separately.

It is hoped that analysis of each rule, combined with a comparative delineation of the Mississippi position, will provide the practicing attorney with a useful reference pertaining to the admission of opinion testimony in both federal and state courts. Indeed, where an attorney has a choice between federal and state court, the applicable rules on admissibility of opinion testimony could well be the determining factor in his choice of a forum.

Rule 701. Lay Opinion Testimony[4]

Rule 701 is a long-overdue recognition of the practical necessity of allowing lay witnesses to speak naturally, in terms of opinion or inference, in describing what they have seen or heard.[5] The rule acknowledges the true worth of such testimony to the ongoing effective administration of justice.[6] How, for example, can a witness describe something that smells like a rose except by simply stating his opinion that it smells like a rose? To require a statement of the underlying "olfactory facts" would render the witness essentially mute. Do we, therefore, allow his opinion to be taken and weighed by the trier of fact as a part of the total evidentiary package, or exclude it and hazard the loss of potentially illuminating evidence? The accurate determination of truth is, after all, the ultimate goal of all litigation. It is this dilemma that rule 701 seeks to remedy.[7]

The need for rule 701's remedial measures arose from strict application of the archaic opinion rule which limits a witness' testimony to the "firsthand knowledge of facts" he perceived and excludes all his inferences, conclusions, and opinions drawn from those facts.[8] This exclusionary rule and the frequent ill effects of its application have been the subject of justifiable criticism from legal scholars.[9] More than fifty years ago, Judge Learned Hand observed:

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[4] Fed. R. Evid. 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

See Criminal Law 🔑 448-65; Evidence 🔑 470-502; Federal Civil Procedure 🔑 1195.

[5] The rule allows a layman "to testify in terms that are familiar to him rather than in artificial circumlocutions which may cause the jury to miss the point." 3 Weinstein's Evidence ¶ 701[02], at 701-14 (1976).

[6] According to Judge Weinstein, the rule follows the modern trend, which recognizes the need for opinion testimony, but still eliminates unreliable evidence. *Id.* at 701-9.

[7] Fed. R. Evid. 701, Advisory Comm. Notes.

[8] 11 Moore's Federal Practice § 700.01, at VII-5 (2d ed. 1976).

> The truth is . . . that the exclusion of opinion evidence has been carried beyond reason in this country, and that it would be a large advance if courts were to admit it with freedom. The line between opinion and fact is at best only one of degree, and ought to depend solely upon practical considerations, as, for example, the saving of time and the mentality of the witness. It is hardly ever reversible error to admit such evidence; its foundation may generally be left to cross-examination. Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of the insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the "facts" in the only way that he knows how, and the result of nagging and checking him is often to choke him altogether . . . .[10]

When strict application of the opinion rule resulted in delay and even obstruction of justice, courts valiantly attempted to restrict the application of the rule. Their vehicle was the age-old device, particularly indigenous to the law of evidence, of engrafting onto the rule specific exceptions to make lay opinion testimony acceptable.[11] The net effect, beyond appellate inconsistency and disharmony, was uncertainty of trial court and counsel, bafflement of witnesses, and confusion of juries. In its notes to rule 701, the Advisory Committee commented that "necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration."[12] The advent of rule 701 and the contribution that its proper application portends are welcome innovations and presumably will alleviate this confusion.

The favorable changes embodied in rule 701 are apparent; however, the negative aspects of its language should not be overlooked. It is advisable to consider the limitations inherent in the rule—those things it is not intended to do and does not do. The rule does not permit lay opinions on questions of law.[13] In this area, the law prior to passage of the rules remains in effect. Nor may the witness testify as an expert. If he is so qualified, rule 701 has no application to his testimony, which is governed by the rules on experts.[14] Finally, the testimony of a lay witness, unlike that of an expert, is limited by two requirements. The opinion must be rationally based on the witness' own perception, that is, firsthand knowledge, and the opinion must be helpful to the trier of fact, either in understanding the witness' testimony, or in determining a fact at issue. Thus, it appears that rule 701 is, by its own terms, relatively restrictive in nature.

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[9] The opinion rule has been called "the clumsiest of all the tools furnished the judge for regulating the examination of witnesses." C. McCormick, Handbook on the Law of Evidence § 11, at 23 (2d (E. Cleary) ed. 1972). Professor Wigmore, who was perhaps its strongest critic, referred to the rule as a "self-justifying dogma," a "specious catch-word . . . handily provided for ignorant objectors" and noted its "extensive and vicious development" in the United States. 7 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1919, at 14 (3d ed. 1940).

[10] Central R.R. v. Monahan, 11 F.2d 212, 214 (2d Cir. 1926).

[11] *See, e.g.*, United States v. Milne, 487 F.2d 1232, 1235-36 (5th Cir. 1973) (lay opinion about sanity), *cert. denied*, 419 U.S. 1123 (1975); Burchill v. Kearney-Nat'l Corp., 468 F.2d 384, 386 (3d Cir. 1972) (opinion within the common experience of the ordinary layman); Berkshire Mut. Ins. v. Moffett, 378 F.2d 1007, 1010 (5th Cir. 1967) (lay opinion concerning value of personal property); Schaefer v. United States, 265 F.2d 750, 754 (8th Cir.) (handwriting identification), *cert. denied*, 361 U.S. 844 (1959).

[12] Fed. R. Evid. 701, Advisory Comm. Notes.

Practically speaking, the rule merely allows a witness to deliver his testimony by familiar means of expression, freeing him from the orthodox bar against opinion in any form for any purpose.[15] Furthermore, the provision streamlines the judicial process by admitting the witness' opinion when his enumeration of the factual basis for the opinion would be time consuming and burdensome.[16] The customary requirements that testimony be both credible and serve a useful purpose are expressly retained by the joint mandates of rationally based personal perception and helpfulness.[17] Absent firsthand knowledge of the facts combined with a rational conclusion predicated on those facts, a lay witness' opinion is inadmissible.[18] Similarly, unless a lay opinion is necessary to aid the trier of fact's understanding of the witness' testimony or determination of an issue, the opinion is irrelevant.[19]

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[13] J. COTCHETT & A. ELKIND, FEDERAL COURTROOM EVIDENCE 108 (1976) (citing United States v. Milne, 487 F.2d 1232, 1235-36 (5th Cir. 1973) (use of legal definition of insanity)); *see* United States v. Phillips, 478 F.2d 743, 746 n.6 (5th Cir. 1973) (violation of drug laws; mixed question of law and fact); United States v. Stamps, 430 F.2d 33, 37 (5th Cir. 1970) (testimony of police officer in burglary trial).

[14] See notes 73 through 149 and accompanying text *infra*.

[15] 3 WEINSTEIN'S EVIDENCE ¶ 701[02], at 701-9 (1976).

[16] *Id.* at 701-13 to -14; *see* J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 26 (1947).

> If perchance some needless and maybe unserviceable expressions of opinion are mixed in by the fact witnesses, nothing worse than slight loss of time has been suffered; even in these terms, the lost minutes will probably be fewer than those resulting from frequent wrangles over admissibility.

Id.

[17] FED. R. EVID. 701, Advisory Comm. Notes.

[18] *See, e.g.*, Cooper v. Allen, 493 F.2d 765, 768-69 (5th Cir. 1974) (banker's opinion that plaintiff was a good credit risk properly excluded since banker did not know plaintiff at the time in question).

[19] *See, e.g.*, Boomer v. New York Cent. R.R., 409 F.2d 382, 385 (7th Cir. 1969) (testimony concerning subjective feelings and conclusions of the witness properly excluded).

Application of these tests to determine the admissibility of a layman's testimony is within the discretion of the trial judge.[20] A reading of the cases clearly reflects that appellate courts afford the trial judge's rulings on the admissibility of lay opinion testimony the broadest possible latitude.[21] Only where there is a strong showing of obvious and flagrant abuse or of real harm will a reversal be ordered solely because of a trial court's ruling in this area.[22]

Superimposed upon these safeguards rest the protective devices inherent in the adversary system. It is axiomatic that facts speak louder than opinions or conclusions. They are more easily understood, more convincing, and less susceptible to refutation. The competent trial advocate will instinctively, and to the fullest extent permitted by its availability, use a detailed factual account of an event instead of a witness' inference, conclusion, or opinion based on those facts. In addition, skillful cross-examination will fully test the bases for the lay witness' opinion and, thus, its resulting credibility.[23] Furthermore, closing argument should never be overlooked as an opportunity to challenge a witness' testimony. Finally, consideration of unworthy opinion testimony is always circumscribed by the settled principle that the trier of fact is never required to accept the inferences, conclusions, or opinions of any witness.[24] Instead, the trier has uncontrolled discretion to accept or reject any evidence offered during the trial. Trial judges uniformly instruct juries that they are to determine the weight that opinion testimony is to be afforded,[25] and when a judge sits as trier of fact, he is fully aware of his role and will accord the testimony only such weight as he feels it merits.[26] Logically, this ultimate prerogative should assuage concerns that the jury's province will be invaded or its functions usurped and should counterbalance any fear engendered by the rule's liberality.[27]

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[20] J. Cotchett & A. Elkind, *supra* note 13, at 108 (citing United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971)). Because the rule allows discretion, trial judges "should bear in mind that the aim of the rule is to eliminate time-consuming quibbles over objections that would not effect the outcome regardless of how they were decided." 3 Weinstein's Evidence ¶ 701[02], at 701-17 (1976). *See also* C. McCormick, *supra* note 9, § 11, at 25 (prevailing trend is not toward an exclusionary rule, but toward a "rule of preference").

[21] *See* United States v. Butcher, 557 F.2d 666, 669-70 (9th Cir. 1977) (allowing identification of suspect by policeman); Cardwell v. Chesapeake & O. Ry., 504 F.2d 444, 448 (6th Cir. 1974) (allowing widow's testimony in wrongful death action that husband suffered from emotional distress); United States v. Pickett, 470 F.2d 1255, 1258 (D.C. Cir. 1972) (allowing siblings' testimony about sanity of brother accused of murder).

[22] United States v. Pierson, 503 F.2d 173, 176 (D.C. Cir. 1974).

[23] Fed. R. Evid. 701, Advisory Comm. Notes.

[24] 11 Moore's Federal Practice § 701.02, at VII-5, § 701.30, at VII-14 (2d ed. 1976). *See also* J. Wigmore, *supra* note 9, § 1920, at 17-18.

[25] See notes 150 through 168 and accompanying text *infra*.

[26] *See, e.g.*, United States v. Butcher, 557 F.2d 666, 668 n.5 (9th Cir. 1977), where the court instructed the jury as follows: "After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves."

There are several general areas in which the admissibility of lay opinion testimony has been fairly well established. The issue of sanity, for example, may be addressed by a layman if there has been sufficient contact between the witness and the subject. The facts underlying the witness' testimony, however, must also be admitted to show the basis for the opinion.[28] A layman may also describe his observations of what appeared to be pain[29] or intoxication[30] in another. Property values may be the subject of testimony by an owner of the property[31] or a person familiar with the property.[32] A lay witness with sufficient exposure to the handwriting of another may give his opinion about the authenticity of a signature.[33] Similarly, the identity of a speaker in a taped conversation may be established by a lay witness who has heard the voice of the alleged speaker at any time.[34]

The liberal interpretation of rule 701 in the federal courts is illustrated by *United States v. Smith*,[35] a criminal prosecution for misapplication of federal funds. Since criminal intent was an element of the prosecution, a critical question was whether the defendant knew and understood the regulations that he had violated. Considering an objection to a coworker's testimony that the defendant did know and understand the regulations, the court noted that the witness had worked with the defendant and observed him in his administrative position.[36] Since the coworker's testimony facilitated an understanding of a factual issue, it was properly admitted.[37]

The Mississippi Supreme Court has historically followed—or purported to follow—the general rule that lay opinion testimony is not admissible.[38] The court has stated that the purpose of the exclusionary rule is prevention of the witness' usurpation of the jury's function.[39] Strict application of the rule, however, can lead to loss of valuable and illuminating testimony.[40] As a result, the rule's obstructive effect has been ameliorated by numerous exceptions grounded in the necessity for meaningful communication by the witness. The court has long considered the issue on a case-by-case basis without attempting to crystalize its rulings into one opinion, thus sacrificing uniformity and clarity.[41] Nevertheless, when the cases are viewed as a whole, it appears that the Mississippi law on lay opinion testimony is surprisingly similar to that of rule 701 on requirements and breadth of application.

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[27] *See, e.g.*, Artmark Chicago, Ltd. v. United States, 558 F.2d 600, 602 (C.C.P.A. 1977) (court refused to give opinion evidence a great deal of weight where the only basis of opinions was what others had told the witness).

[28] United States v. Pickett, 470 F.2d 1255, 1258 (D.C. Cir. 1972).

[29] Nichols v. Marshall, 486 F.2d 791, 793 (10th Cir. 1973).

[30] Gaynor v. Atlantic Greyhound Corp., 183 F.2d 482, 484 (3d Cir. 1950).

[31] Meredith v. Handy, 554 F.2d 764, 765 (5th Cir. 1977); Klapmeier v. Telecheck Int'l Inc., 482 F.2d 247, 253 (8th Cir. 1973). *But see* United States v. Yeich, 74 F.R.D. 561, 562 (E.D. Pa. 1977) (layman not allowed to testify about rental value of property in condemnation proceeding absent evidence of qualification to do so).

[32] United States v. Sowards, 370 F.2d 87, 92 (10th Cir. 1966).

[33] Schaefer v. United States, 265 F.2d 750, 754 (8th Cir. 1959).

[34] United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974).

[35] 550 F.2d 277 (5th Cir. 1977).

[36] *Id.* at 281.

[37] *Id.*

[38] T. McElroy, Mississippi Evidence § 34, at 154 (1955).

As early as 1881, in *Wood v. State*,[42] a case involving lay opinion on the issue of sanity, the Mississippi Supreme Court held that "[t]he sounder rule . . . is to admit the opinions of non-experts, accompanied by a statement of the facts on which they are based, whenever the witness has had such acquaintance or opportunities of observation as are likely to make his opinion valuable."[43] The parallels in criteria for admission of lay opinion testimony embodied in the above language and in rule 701 are notable. The state requirement that lay opinions be "accompanied by a statement of the facts on which they are based" is closely analogous to rule 701's requirement that opinions be "rationally based on the perception of the witness."[44]

In Mississippi, a lay opinion must meet three requirements before it can be admitted: personal knowledge, competence of the witness, and necessity of the testimony to enable the trier of fact to reach a decision.[45] Before a witness can relate his opinion on a matter, the proper foundation must be laid by having him specify in detail the factual bases for the opinion.[46] These facts must show that the witness has personal, or firsthand, knowledge of the event.[47] Even though he is shown to have firsthand knowledge, the witness must also be competent to state such an opinion.[48] A layman's competency is limited to those things "about which all men have more or less knowledge according to their mental capacity and habits of observation"[49] and from which they are able to draw a logical conclusion.

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[39] *See, e.g.*, Lynch v. Suthoff, 220 So. 2d 593, 596-97 (Miss. 1969); Harris v. Pounds, 185 Miss. 688, 698-99, 187 So. 891, 894-95 (1939).

[40] 7 J. Wigmore, *supra* note 9, § 1921, at 18.

[41] *See generally* Comment, *Lay Opinion Testimony in Mississippi*, 43 Miss. L.J. 705 (1972).

[42] 58 Miss. 741 (1881).

[43] *Id.* at 743.

[44] Fed. R. Evid. 701.

[45] Comment, *supra* note 41, at 716.

[46] *Id.* at 714.

[47] *See* Illinois Cent. R.R. v. Williams, 242 Miss. 586, 607, 135 So. 2d 831, 839 (1961) (witness must ordinarily confine testimony to personal knowledge); Ward v. Ward, 124 Miss. 697, 708, 87 So. 153, 155 (1921) (lay witness must give facts on which opinion is based); Torrance v. Hurst, 1 Miss. (Walker) 403, 404-05 (1831) (same).

[48] Hutson v. Continental Cas. Co., 143 Miss. 388, 395, 107 So. 520, 522 (1926).

The third requirement—necessity—is the point at which the Mississippi rule diverges most sharply from the federal rule, at least from a semantical viewpoint. Although the federal rule expressly disclaims necessity as a standard for admissibility,[50] the necessity standard as applied in Mississippi closely resembles the "usefulness to the trier of fact" criterion of the federal rule.

There are three separate considerations within Mississippi's "necessity" standard. The first consideration is the need or lack of need for any opinion at all. If factual evidence sufficient for determination of the issue has been elicited, then a lay witness' opinion is superfluous and should not be admitted.[51] The second consideration is utility, that is, whether the testimony will be of appreciable assistance to the trier of fact in determination of the issue. If so, it should be admitted as necessary.[52] In some situations a lay opinion may fail to meet the Mississippi "necessity" requirement while satisfying the federal "usefulness" requirement.[53] Nonetheless, the two criteria embody essentially the same concept stated differently.[54] Third, a lay witness' ability to testify meaningfully must be considered. If it is not possible for the witness to relate factual evidence in a way that will permit full understanding and intelligent interpretation by the trier of fact, the lay opinion should not be received in evidence.[55]

The subjects on which lay opinion is permitted in Mississippi closely parallel those in the federal domain. Sanity is one of the traditional issues to which a layman with firsthand knowledge can attest.[56] The supreme court has repeatedly stated, however, that any lay opinion concerning insanity must be accompanied by a statement of the facts on which the witness' conclusion is based.[57] A layman may also testify about his own[58] or another's physical condition, that is, whether a person appeared to be in good or bad health[59] or in pain.[60] In 1971, the court broadly described the types of physical conditions a layman may describe:

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[49] *Id.; see* Shivel v. Ferguson, 259 So. 2d 123, 126 (Miss. 1972) (police officer could not testify about how an accident occurred); *In re* Estate of Prince, 208 So. 2d 187, 190 (Miss. 1968) (lay opinion cannot venture into areas requiring expert knowledge).

[50] See note 9 and accompanying text *supra*.

[51] Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 492, 148 So. 2d 693, 695 (1963) (where opinion is on a common matter, layman can add no special knowledge for jury); Ming v. City of Jackson, 202 Miss. 260, 267, 31 So. 2d 900, 901 (1947) (same); Louisville, N.D. & T. Ry. v. Natchez, J. & C.R.R., 67 Miss. 399, 403-04, 7 So. 350, 351 (1890) (same).

[52] 7 J. WIGMORE, *supra* note 9, § 1923, at 21. *See also* Illinois Cent. R.R. v. Williams, 242 Miss. 586, 607, 135 So. 2d 831, 839 (1961).

[53] *See* FED. R. EVID. 701(b).

[54] Comment, *supra* note 41, at 707-08.

[55] Illinois Cent. R.R. v. Williams, 242 Miss. 586, 607, 135 So. 2d 831, 839 (1961); Messina v. New York Life Ins. Co., 173 Miss. 378, 390, 161 So. 462, 464 (1935).

[56] Hickey v. Anderson, 210 Miss. 455, 464, 49 So. 2d 713, 717 (1951); Gathings v. Howard, 122 Miss. 355, 384, 84 So. 240, 246-47 (1920).

> In general terms it may be said that an ordinary lay observer who has had a reasonable opportunity to see and observe the person involved may testify about his observation of the physical condition and appearance of the person in question, as to his being in apparent pain, or tired, feeble, weak, pale, crippled, conscious or unconscious; that his face was red or drawn or other like physical features when such evidence is pertinent to the issue involved.[61]

A layman may also give his opinion of a person's age,[62] identity,[63] or the authenticity of a signature.[64] The witness need not ever have seen the person sign his name so long as the witness has become familiar with the signature through correspondence on which both parties have acted.[65] A layman is competent to testify to the value of land with which he is familiar,[66] but the facts showing his knowledge of the land must be in evidence.[67] While lay testimony about approximate speed[68] or measurement of distance[69] is permissible, such testimony must yield to actual measurements,[70] since all opinion testimony gives way to more concrete evidence.

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[57] Baird v. State, 146 Miss. 547, 550, 112 So. 705, 705 (1927); *see* Hickey v. Anderson, 210 Miss. 455, 464, 49 So. 2d 713, 717 (1951) (firsthand knowledge required); Wood v. State, 58 Miss. 741, 742-43 (1881) (same). Lay opinion concerning sanity, however, needs no statement of specific facts. Baird v. State, 146 Miss. at 550, 112 So. at 705.

[58] Dennis v. Prisock, 221 So. 2d 706, 710-11 (Miss. 1969).

[59] *See* Columbian Mut. Life Ins. Co. v. Gunn, 173 Miss. 897, 909, 163 So. 454, 456 (1935) (lay opinion relevant to issue of whether insured was totally and permanently disabled for recovery purposes).

[60] McNeely v. Blain, 255 So. 2d 923, 925-26 (Miss. 1971).

[61] *Id.*

[62] Messina v. New York Life Ins. Co., 173 Miss. 378, 389, 161 So. 462, 464 (1935). The *Messina* court ruled, however, that since opinion evidence gives way to a higher or better class of evidence, and such evidence was available in the case at bar, the opinion of the witness was inappropriate. *Id.* at 390, 161 So. at 464.

[63] *See* Mathison v. State, 87 Miss. 739, 767, 40 So. 801, 811 (1906) (woman's identification of defendant was admissible, although it was error to exclude testimony that her eyesight was defective, which would have undermined her opinion).

[64] McCarty v. Love, 145 Miss. 330, 341, 110 So. 795, 796 (1927).

[65] Western Union Tel. Co. v. Goodman, 166 Miss. 782, 796-97, 146 So. 128, 131 (1933); Southern Express Co. v. Thornton, 41 Miss. 216, 221-22 (1866).

[66] Mississippi Power Co. v. Walters, 204 So. 2d 471, 476 (Miss. 1967); Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 598-99, 172 So. 2d 196, 204 (1965).

[67] Bynum v. Mandrel Indus., Inc., 241 So. 2d 629, 636 (Miss. 1970); Dyer v. Hobert, 150 Miss. 857, 860-61, 117 So. 244, 245 (1928); Town of Union v. J.R. Buckwalter Lumber Co., 136 Miss. 414, 419-20, 101 So. 561, 562 (1924). *See also* National Bank v. Gorenflo, 173 Miss. 646, 655, 160 So. 911, 914 (1955) (layman allowed to testify about value of stock after stating the facts and knowledge on which his opinion was based).

[68] Perez v. Fayard, 64 F.2d 667, 668-69 (5th Cir. 1933); Howard v. State, 346 So. 2d 918, 920 (Miss. 1977).

The above guidelines, which have evolved through decisions of the Mississippi Supreme Court, obviously do not substantially differ from those enunciated in rule 701.[71] Subdivision (a) of rule 701 is the equivalent of the Mississippi knowledge requirement. The Mississippi requirements of "utility to the trier of fact" and "facility of the witness" are the same considerations contemplated by subdivision (b) of the federal rule. Moreover, the "need of an opinion" consideration in Mississippi clearly appears to be embodied in the "is limited to" language of the federal rule. Finally, the Mississippi requirement of competency, because of its inherent quality and universal application to the admissibility of all evidence, is certainly implicit in rule 701. The conclusion seems manifest, therefore, that the prerequisites for admission of lay opinion testimony in Mississippi do not vary greatly from those in the federal system. One caveat is, however, in order. Even though lay opinion testimony meets all of the Mississippi requirements stated above, it could still be held inadmissible if the opinion embraces an ultimate issue to be decided by the trier of fact. In the federal system this limitation has been abrogated by rule 704.[72]

EXPERT OPINION TESTIMONY

In any consideration of expert opinion testimony it should be remembered that admission of expert testimony is an evolutionary offspring of the basic opinion rule.[73] Indeed, it is the initial historic exception to that rule, necessitated by cases that involved matters too technical in nature and too obtuse in substance to be within the intellectual grasp of the trier of fact.[74] Consequently, one who could establish that he was equipped with certain special qualifications was permitted to give his opinion to assist the trier in properly evaluating the facts, drawing justifiable inferences, and reaching correct conclusions.[75] Thus, the "expert" was introduced into the courtroom. The complex advances of modern society and the development of new fields and broadening of old fields of law to cope with these modern advances made expert testimony even more essential. The rules to be analyzed in this section govern the admissibility and use of expert opinion as testimonial evidence. These rules expand the use of experts in federal litigation and assure the expert an increasing role in the judicial process. They will be treated as a group, and will be followed by a commentary on Mississippi's position in regard to each rule.

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[69] Hardaway Contracting Co. v. Rivers, 181 Miss. 727, 735, 180 So. 800, 802 (1938); S.H. Kress & Co. v. Sharp, 156 Miss. 693, 698-701, 126 So. 650, 651 (1930).

[70] See note 69 *supra*.

[71] *See, e.g.*, Howard v. State, 346 So. 2d 918, 920 (Miss. 1977) (lay opinion admissible when based on observation and surrounding facts and circumstances).

[72] See notes 150 through 168 and accompanying text *infra*.

[73] See notes 8 through 11 and accompanying text *supra*.

[74] Comment, *supra* note 41, at 709-10.

[75] *Id.* at 709.

RULE 702. TESTIMONY BY EXPERTS[76]

Rule 702 is purposefully general in terms and broad in scope. The rule has four basic purposes: (1) it recognizes the need for, and authorizes the use of, expert testimony; (2) it defines the condition under which such testimony may be utilized—where specialized knowledge will be helpful to the trier of fact; (3) it delineates the standards required of those who give such testimony, stating that the witness must be qualified by "knowledge, skill, experience, training, or education"; (4) it prescribes the form that such testimony may take, providing that testimony may be "in the form of an opinion or otherwise."

A traditionally recognized evil accompanying the use of expert testimony has been its potential aura of infallibility—the danger that the trier of fact, particularly a lay jury, will ascribe to it unwarranted significance and accord it undue weight.[77] Thus, prior to the advent of rule 702, there existed in federal practice two conditions for its admission. First, the evidentiary subject matter of litigation was required to be beyond the common knowledge of ordinary people and not customarily within the normal trier of fact's capacity for understanding.[78] Accordingly, expert testimony had to be necessary to aid the trier in his understanding at the hearing and his consideration during deliberation. Generally, "if the matter [was] susceptible of the intelligent consideration by a layman of common experience and understanding," the expert's testimony was not admissible.[79] This reasoning is implicit in rule 702.[80]

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[76] FED. R. EVID. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

See Criminal Law 🔑 469-86; Evidence 🔑 505-60; Federal Civil Procedure 🔑 1195.

[77] *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (expert not permitted to testify about unreliability of eyewitness identification made under stress).

[78] Bridger v. Union Ry., 355 F.2d 382, 387 (6th Cir. 1966).

[79] 11 MOORE'S FEDERAL PRACTICE § 702.10, at VII-23 (2d ed. 1976).

[80] The functions for which "aid" is a recognized "need" are fundamentally identical as regards the admissibility of both lay and expert opinion testimony. The key words are "understanding" and "understand," together with "determination" and "determine."

Second, the witness was required to be properly qualified as an expert—to have a superior grasp of the subject matter of his testimony which would ensure its worthiness.[81] Rule 702 expressly retains both of these conditions. More importantly, however, it substantially liberalizes both of them.

Under rule 702, assistance to the trier of fact is no longer limited solely to fields of "scientific" or "technical" knowledge, but is deliberately extended to fields of "other specialized knowledge."[82] Similarly, standards for determining whether a witness is sufficiently qualified as an expert have been greatly expanded. The 1969 draft of the rule provided expert status for "a witness qualified as an expert by special knowledge, skill, experience, training or education."[83] In the March 1971 draft, which was finally adopted, the word "special" was deleted without substitution.[84] Under the present standard, if an expert "has some qualification by education and experience, the limits of his expertise go to weight, not admissibility."[85] In this regard, the Advisory Committee expressed its intent as follows:

> Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, *e.g.*, physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.[86]

Forbro Design Corp. v. Raytheon Co.[87] illustrates application of this less demanding standard. A defense expert in circuit design was permitted to testify at the trial about the state of the art and level of ordinary skill in the power supply field some twenty years previously. He admitted he did not consider himself to have been an expert at that time, though he was presently so qualified. In affirming, the First Circuit found no abuse of discretion in admitting his testimony.[88]

Rule 701 requires helpfulness to an "understanding of his [the lay witness'] testimony." Rule 702 requires assistance to "understand the evidence." The alternative function under both rules is "determination of a fact in issue." FED. R. EVID. 702.

[81] Bridger v. Union Ry., 355 F.2d 382, 387 (6th Cir. 1966).

[82] *See* FED. R. EVID. 702, Advisory Comm. Notes.

[83] 11 MOORE'S FEDERAL PRACTICE § 700.01, at VII-21 (2d ed. 1976).

[84] *Id.* at VII-21 n.1.

[85] [1976] FED. R. EVID. NEWS 91 (Callaghan & Co.). "[T]he expert need not have a complete knowledge about the field in question. He need not be certain. He need only be able to aid the jury in resolving a relevant issue." 3 WEINSTEIN'S EVIDENCE ¶ 702[02], at 702-13 to -14 (1976) (footnote omitted).

[86] FED. R. EVID. 702, Advisory Comm. Notes.

[87] 532 F.2d 758 (1st Cir. 1976).

[88] *Id.* at 762.

On the other hand, in *United States v. Green,*[89] the Sixth Circuit reversed a conviction for conspiracy to manufacture an hallucinogen where the trial court admitted the testimony of a chemist on the harmful effects of the drug and an undercover DEA agent on the street value of the drug. The court observed that in criminal cases rule 702 requires not only an assessment of helpfulness to the jury but also a balancing of probative value against prejudice, since any prejudicial effect is magnified when evidence is clothed in expertise.[90]

While the federal cases antedating rule 702 reflect a distinct trend toward increasing both the subjects on which experts may testify and the group of persons deemed qualified to give such testimony, the codified approval that the rule accords each trend will undoubtedly promote further expansion. Attorneys will inevitably proffer less qualified persons to testify on new subject matters. The result will be an increase in challenges by counsel and more difficult decision-making for courts. And since rule 104(a), except in the area of privilege, frees courts from the rules of evidence in determining preliminary questions of admissibility of evidence and qualifications of persons, the practitioner can anticipate an increase in the use of threshold proceedings, such as motions in limine, to obtain advance determinations in these areas.

Rule 702 allows an expert to testify "in the form of an opinion or otherwise." The 1969 draft did not include this phrase; it was added to the March 1971 draft, which remained unchanged.[91] This clause simply permits nonopinion testimony by an expert about all relevant data within his expertise.[92] The expert is, however, required to refrain from expressing or implying an opinion if the trier of fact is deemed capable of applying the data to the facts to reach its own opinion.[93] The extension of the expert opinion rule to nonopinion testimony was the result of prior concern over the effect of opinion testimony on ultimate issues.[94] One of its ancillary benefits may be a decrease in the use of lengthy and confusing hypothetical questions. The Advisory Committee itself implicitly expressed a preference for nonopinion testimony by an expert in all instances where it can be effectively employed.[95] Similar preference by the courts is foreseeable.[96]

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[89] 548 F.2d 1261 (6th Cir. 1977).

[90] *Id.* at 1268; *accord*, United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977) (defendant's right to a fair trial requires that expert opinion testimony based on unproved hypotheses be excluded).

[91] 11 MOORE'S FEDERAL PRACTICE § 700.01, at VII-19 (2d ed. 1976).

[92] 3 WEINSTEIN'S EVIDENCE ¶ 702[03], at 702-14 (1976). "[E]xperts should certainly be permitted to state the applicable principles to the jurors and allow them to draw inferences warranted by the facts of the case." *Id.* at 702-15.

[93] This requirement is consistent with the principles underlying the admissibility of opinion testimony, *i.e.*, "whether it will assist the trier of fact in understanding the evidence or determining a fact in issue." *Id.* ¶ 702[01], at 702-5; *accord*, 7 J. WIGMORE, *supra* note 9, at 21.

[94] 11 MOORE'S FEDERAL PRACTICE § 700.01, at VII-19 (2d ed. 1976).

As with lay opinion testimony under rule 701, various safeguards counteract the possibility of abuse under rule 702. First, a determination of whether the admissibility prerequisites have been met is committed to the discretion of the court, subject to reversal only for manifest error or clear abuse resulting in true injustice.[97] Second, all of the protective effects[98] inherent in the adversary system remain viable, particularly the availability of cross-examination to challenge the qualifications of the expert. Finally, the trier of fact continues as the ultimate arbiter with respect to acceptance or rejection of expert opinion testimony and retains the prerogative to weigh the evidence. This prerogative extends to the weight afforded the witness' qualifications as an expert, as well as the credibility of his testimony.

> [95] Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in nonopinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

FED. R. EVID. 702, Advisory Comm. Notes.

[96] Although the case was decided well before rule 702 became effective, Neilson v. Bromer, 241 F.2d 256 (10th Cir. 1957), is cited in 11 MOORE'S FEDERAL PRACTICE § 702.20, at VII-31 (2d ed. 1976), as illustrative of such a trend. An expert was allowed to testify that the use of automobile tire chains under the circumstances of the case would have been inadvisable. According to the court of appeals, this testimony constituted usurpation of the jury's function. In effect the court said that the expert witness should have set forth the relevant data about automobile tire chains, their performance under different road conditions, and then have left to the jury the application of these principles to the facts of the case. *Id.*

[97] "The cases clearly indicate that the trial judge's ruling either excluding or admitting evidence will not be disturbed." 3 WEINSTEIN'S EVIDENCE ¶ 702[01], at 702-9 (1976). "Doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions. The jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberation." *Id.* at 702-9; *see id.* ¶ 702[02], at 702-10 (no reversal absent showing of "clear abuse"). That the trial judge's decision will not be reversed is illustrated by two recent Fifth Circuit cases with similar fact situations. *Compare* United States v. Viglia, 549 F.2d 835, 836 (5th Cir.) (not error to qualify pediatrician to testify to obesity, although he had no experience in that field), *cert. denied*, 97 S. Ct. 121 (1977) *with* United States v. Lopez, 543 F.2d 1156, 1158 (5th Cir. 1976) (not error to refuse to qualify psychologist who lacked clinical experience), *cert. denied*, 429 U.S. 1111 (1977).

[98] See notes 22 through 27 and accompanying text *supra*.

Rule 703. Bases of Opinion Testimony by Experts[99]

While rule 702 delineates basic criteria required for admission of expert opinion testimony, rule 703 establishes the acceptable factual bases for such testimony. Implicit in the rule is a recognition that all opinion testimony must have a factual basis and that the value of an opinion is entitled to no more weight than the facts upon which it is predicated.

Under the rule, there are three possible sources of facts or data upon which the opinion of an expert witness may be based. The first of these is firsthand observation, the personal perceptions of the witness.[100] This category includes, for example, a physician who initially examined and continually treated a patient for the injury or illness for which claim is made. The second source consists of the facts presented to the witness at trial,[101] in one of two forms. A hypothetical question based on the evidence adduced at trial and embodying all factual predicates necessary for an opinion may be propounded to an expert who has not observed the trial. In the alternative, a witness may attend and observe the entire trial and, from the proof presented, independently determine the relevant predicates for his opinion. The third source of an opinion may be facts or data presented to the witness outside of court.[102] In this situation, a physician lacking firsthand knowledge may use otherwise inadmissible facts and data that have been made available from multiple sources and that constitute sufficient predicates for an opinion.

Firsthand observation[103] and the hypothetical question have long been recognized by all courts,[104] and rule 703 merely reflects existing practice dealing with these two sources. With respect to expert witness trial observation as a technique, however, the rule represents a liberalization of previous practice. Although a number of federal courts permitted an expert to attend the hearing and make a personal determination of relevant facts and data prior to adoption of the Federal Rules of

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[99] Fed. R. Evid. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See Criminal Law 🔑 478; Evidence 🔑 505-34; Federal Civil Procedure 🔑 1195.

[100] Fed. R. Evid. 703, Advisory Comm. Notes.

[101] *Id.*

[102] *Id.*

[103] Establishing the witness' firsthand knowledge is obviously the most desirable technique. The expert's opinion based on personal knowledge of the facts will inevitably be a more credible opinion. *See* 3 Weinstein's Evidence ¶ 703[02], at 703-7 to -8 (1976).

[104] Fed. R. Evid. 703, Advisory Comm. Notes.

Evidence,[105] the practice was not unanimously approved.[106]

An imperfection in the trial observation technique is the difficulty of determining, particularly when the evidence is conflicting, which segments of the proof constitute the predicates for the expert's opinion. The Advisory Committee seems to have regarded this imperfection as more apparent than real, its conclusion being that "[p]roblems of determining what testimony the expert relied upon, when . . . the testimony is in conflict, may be resolved by resort to Rule 705."[107] Under rule 705, the trial judge has authority to require an expert to disclose the basis for his conclusion.[108] For pragmatic reasons of persuasion and credibility, however, a trial attorney should initially elicit from the "trial observing" expert all facts or data that he has obtained from the hearing and on which he is basing the opinion.[109]

The third technique, permitting the expert to rely upon data made available before the hearing, is the most far-reaching and controversial liberalization accorded by rule 703.[110] The rationale underlying this expansion was explained by the Advisory Committee:

> [T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety . . . . The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purpose.[111]

The objection that these out-of-court facts alone would be inadmissible in many instances is self-evident. It should be observed, however, that this authorized third technique is not a carte blanche invitation to receipt of unreliable expert opinions. The rule itself mitigates this hazard by providing that any facts or data so potentially tainted are available only if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[112] The Fifth Circuit, in *Mealy v. Slaton Machinery Sales, Inc.*,[113] expressly approved admission under rule 703 of an economic expert's testimony predicated on Department of Labor statistics. Because the suit was a diversity wrongful death action, the damages were determined by a Florida statute that required damages to be calculated on a formula of estimated future earnings less estimated future expenses and support. The defendant contended the expert should have been required to rely on the decedent's actual expenses rather than the Department of Labor statistics in estimating future expenses. The court of appeals affirmed, holding that the defendant's complaint only applied to the weight to be afforded the testimony.[114]

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[105] *See, e.g.*, Sears, Roebuck & Co. v. Penn Central Co., 420 F.2d 560, 562 (1st Cir. 1970) (fire and explosion investigator allowed to testify about his opinion on the improper extinguishment of a fire).

[106] *See, e.g.*, Melton v. O.F. Shearer & Sons, Inc., 436 F.2d 22, 28 (6th Cir. 1970) (the general rule is that "facts assumed by an expert which are not within his personal knowledge must be supported by evidence from which a finding of the existence of such facts can be made").

[107] FED. R. EVID. 703, Advisory Comm. Notes.

[108] See notes 123 through 131 and accompanying text *infra*.

[109] J. COTCHETT & A. ELKIND, *supra* note 13, at 114.

[110] Prohibitions against such bases of opinion were grounded in hearsay objections. Those who opposed allowing the expert to rely upon inadmissible evidence primarily feared introduction of unreliable evidence and impairment of the right to effective cross-examination. 3 WEINSTEIN'S EVIDENCE ¶ 703[02], at 703-9 (1976).

[111] FED. R. EVID. 703, Advisory Comm. Notes.

Application of the principles enunciated in rule 703 will, of course, rest largely in the court's exercise of discretion on a case-by-case basis. In the exercise of their discretion to determine whether the opinion is "[o]f a type reasonably relied upon by experts in the particular field," it has been suggested that trial judges should consider four factors: "(a) the importance of the issue, (b) the extent to which the opinion relies on material not offered, (c) the impression on the jury, and (d) the availability of that out of court material."[115]

One of the most difficult problems presented by rule 703 is whether its application in criminal cases violates the confrontation clause of the federal constitution. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him."[116] The issues thus presented are whether the sixth amendment is impermissibly breached by a criminal conviction partially based on expert opinion testimony which is predicated on facts or data not offered in evidence, and if it is not, whether the general proscription against hearsay should nevertheless be more stringently applied in a criminal case.

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[112] Judge Weinstein observed that the determination of reasonable reliance lies within the domain of the trial judge's authority. 3 WEINSTEIN'S EVIDENCE ¶ 703[02], at 703-15 (1976). A part of this determination is concerned with whether the expert himself and others in the field would actually rely on such data "for purposes other than testifying in a lawsuit." *Id.* ¶ 703[03], at 703-17.

[113] 508 F.2d 87 (5th Cir. 1975).

[114] *Id.* at 92.

[115] J. COTCHETT & A. ELKIND, *supra* note 13, at 116. See note 112 *supra*.

Although space limitations do not permit detailed consideration here, three interesting areas under rule 703 are discussed in depth in 11 MOORE'S FEDERAL PRACTICE §§ 703.20 -.40 (2d ed. 1976). Professor Moore concludes that solicitation of experts in anticipation of litigation will not exclude their testimony. *Id.* § 703.20, at VII-52. Similarly, under proper guidelines, experimentation by the expert both in and out of court will be admissible. *Id.* § 703.30, at VII-53. Amelioration of the hearsay burden will undoubtedly expand admissibility of opinion poll evidence. *Id.* § 703.40, at VII-54.

[116] U.S. CONST. amend. VI.

The Fifth Circuit has confronted both of these issues. In *United States v. Williams*,[117] a prosecution and conviction for conspiracy, the value of the net future earnings of certain oil and gas producing properties was a relevant issue. The government's expert witness had based his opinion of their value primarily on certain corporate records not themselves offered in evidence. The panel first discussed the fundamental importance of the sixth amendment right of confrontation to a fair trial. It concluded, without addressing the hearsay issue, that the defendant

> was deprived of his constitutional right to confront and cross-examine the witnesses who might be offered by the Government to authenticate the records of the two companies on which the [expert] witness . . . relied in making his value appraisals. For that error the judgment of conviction . . . must be reversed.[118]

On rehearing, an en banc court addressed both of the above issues. With the original panel dissenting, the majority reversed the court's earlier decision and affirmed the judgment of the district court in all respects.[119] Concerning the confrontation clause, the court held that the panel's determination that *California v. Green*[120] made such testimony a violation of the confrontation clause was incorrect. According to the en banc majority,

> *Green* makes it clear that the confrontation guarantee focuses upon "the right of the accused to confront and probe each of his accusers—a narrow adversary activity."
>
> . . . In light of the reasoning in *Green*, we conclude that [the expert's] presence at the trial and his availability for cross-examination satisfied the constitutional right of confrontation regardless of whether his testimony fell within one of the traditional exceptions to the hearsay rule.[121]

The court then turned to the argument that the rule against hearsay should be more strictly applied in criminal cases and, again, its answer was in the negative. The criminal defendant's built-in constitutional protections under the confrontation clause and a presumption of innocence "are in no way undermined by" application of uniform hearsay standards.[122]

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[117] 424 F.2d 344 (5th Cir. 1970), *rev'd en banc*, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

[118] 424 F.2d at 349-50.

[119] 447 F.2d 1285, 1289-90 (5th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 954 (1972).

[120] 399 U.S. 149 (1970).

[121] 447 F.2d at 1289-90 (quoting *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 108, 112 (1970)).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion[123]

While rule 703 defines the sources from which experts may draw the facts or data that serve as bases for their opinions, rule 705 allows the expert to state his opinion without first disclosing these underlying facts or data. The rule does, however, retain the prerogative of the court to require prior disclosure. Because of the close relation of these two rules, rule 705 is considered out of its normal sequence under Article VII.

Rule 705 eliminates the traditional prior disclosure requirement, thus obviating the necessity of the hypothetical question—the usual device for meeting the requirement. Furthermore, as the Advisory Committee observed, "This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand."[124] It should be remembered, however, that the hypothetical is not abolished, and it may still be used by counsel if desired.[125] It is simply no longer required unless the court so orders.

Conceptually, the hypothetical is an excellent method of examination. Under this method the previously qualified expert is required to make factual assumptions enumerated by counsel. These assumptions must be based on facts in evidence[126] and, therefore, are susceptible to belief or disbelief by the trier of fact. Any assumptions not supported by the evidence are prohibited. The expert is then asked to give his opinion predicated on these assumptions. If the trier accepts the assumed facts or data as true, the expert's opinion may also be accepted as valid.[127] Of course, the problem lies in application of the theory—in posing the hypothetical fairly and including only proper factual data. Criticism has been widespread because of the hypothetical's susceptibility to abuse. "Partisan bias, length of questions, awkwardness and complexity of expression have placed a stigma upon [hypothetical questions] as an obstruction to the administration of justice."[128]

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[122] 447 F.2d at 1291. *Williams* has subsequently been cited with approval. *See* United States v. Burrell, 505 F.2d 904, 910 (5th Cir. 1974) (income tax evasion); United States v. Musgrave, 483 F.2d 327, 336 (5th Cir.) (conspiracy to defraud), *cert. denied*, 414 U.S. 1023 (1973). But the court declined to apply *Williams* or rule 703 in United States v. Brown, 548 F.2d 1194, 1206 n.22 (5th Cir. 1977), a prosecution of a tax return preparer for advising and procuring filing of fraudulent tax returns of others. The court held inadmissible the testimony of an IRS auditor that 90-95% of 160 audited returns prepared by the defendant contained overstated deductions. Since the auditor did not take the stand as an expert and never presented the returns or audit records to substantiate her testimony, neither rule 703 nor the *Williams* case was applicable. *Id.* at 1206.

[123] Fed. R. Evid. 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

See Criminal Law 🔑 486; Evidence 🔑 555; Federal Civil Procedure 🔑 1195.

[124] Fed. R. Evid. 705, Advisory Comm. Notes.

[125] 11 Moore's Federal Practice § 705.10, at VII-71 to -73 (2d ed. 1976); 3 Weinstein's Evidence ¶ 705[01], at 705-6 (1976).

[126] C. McCormick, *supra* note 9, § 14, at 33. "Direct testimony supporting the fact assumed is not required. It is sufficient if it is fairly inferable from circumstances proved." *Id.* (footnote omitted).

In addition to the diminishing effect of rule 705 on the use of hypothetical questions, the rule clearly seems calculated to have great impact in at least two other areas of interest. First, with elimination of prior disclosure, increased emphasis will undoubtedly fall on effective cross-examination.[129] Second, since effective cross-examination is dependent upon prior knowledge, the rule can be expected to result in an increased use of pretrial discovery. While it has been observed that "[t]aking the deposition of opponent's expert witness as part of discovery is almost a 'must' to guard against opinions based in part on irrelevancies,"[130] deposing the witness is not a simple procedure. An expert retained by the opposite side can only be deposed by order of the court and for good cause. The Advisory Committee justified this restrictive provision on the ground that rule 26(b)(4) of the Federal Rules of Civil Procedure allows sufficient discovery to determine the expert's underlying data.[131]

From an examination of the Mississippi law concerning expert testimony, it appears that the only significant differences between state law and the federal rules are in the areas of expert opinions based on out-of-court information instead of on firsthand knowledge and the methods by which expert opinions can be elicited.

Mississippi has long sanctioned the use of expert opinion testimony to assist the trier of fact in resolving issues. The key criterion for the use of expert testimony is the traditional common law requirement of necessity.[132] If the opinion sought to be offered by an expert is one that ordinary laymen are capable of forming, then the expert's opinion is superflous. In the words of the Mississippi Supreme Court, "[S]ince an expert witness in a sense discharges the functions of a juror, his opinion should not be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, of drawing correct conclusions from the facts."[133]

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[127] 11 Moore's Federal Practice § 705.10, at VII-71 (2d ed. 1976).

[128] Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 427 (1952). The Eighth Circuit, in 1969, lauded the not yet enacted federal rules as being designed "to remove stereotyped, long, belabored and nonsensical hypothetical questions from the arena of trial." Twin City Plaza, Inc. v. Central Sur. & Ins. Corp., 409 F.2d 1195, 1201 (8th Cir. 1969).

[129] 11 Moore's Federal Practice § 705.10, at VII-72 (2d ed. 1976).

[130] J. Cotchett & A. Elkind, *supra* note 13, at 117.

[131] Fed. R. Evid. 705, Advisory Comm. Notes.

[132] Illinois Cent. R.R. v. Williams, 242 Miss. 586, 607, 135 So. 2d 831, 840 (1961).

In order to qualify a witness as an expert, the witness must be shown to have a special knowledge of the subject matter about which he is to testify. This knowledge may be "obtained by a study of recognized authorities or through practical experience."[134] Furthermore, the expert need not possess the highest degree of skill or expertise. It is sufficient that he be qualified to assist the jury by an opinion based on knowledge not held by ordinary laymen.[135]

As always, decision on the question of the expert's competence as determined by his qualifications is left to the discretion of the trial court[136] and will be overruled by an appellate court only if there has been a clear abuse of discretion.[137]

Distinctions of consequence exist between federal and state postures regarding when and from whom expert opinion evidence may be received. Mississippi law dealing with the basis of an expert's opinion differs radically from the federal approach. Mississippi's rule is that the expert must base his opinion on personal knowledge or facts in evidence,[138] and the hypothetical question is the recognized device for presenting the facts in evidence to the expert. The wide departure from the state rule by rule 703 is readily apparent.

When a properly qualified expert witness is not testifying from his own knowledge, the Mississippi rule is that the opinion must be elicited by means of a hypothetical question.[139] Whether a hypothetical will be allowed is a matter within the discretion of the court,[140] and the basis for the facts assumed in the question must be found in the record.[141] The hypothetical need not necessarily embrace every fact that an opposing party contends should affect the judgment.[142] Rather, the attorney may build his question on any theory that may reasonably be drawn from the evidence.[143]

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[133] *Id.*

[134] Early-Gary, Inc. v. Walters, 294 So. 2d 181, 185 (Miss. 1974); *accord*, Illinois Cent. R.R. v. Benoit Gin Co., 248 So. 2d 426, 428 (Miss. 1971); Gulf, M. & O.R.R. v. Hollingshead, 236 So. 2d 393, 396 (Miss. 1970).

[135] Glen Falls Ins. Co. v. Linwood Elevator, 241 Miss. 400, 417, 130 So. 2d 262, 268 (1961). In this respect, the Mississippi rule accords with the philosophy behind federal rule 703. *See* 3 WEINSTEIN'S EVIDENCE ¶ 702[02], at 702-13 (2d ed. 1976).

[136] Gulf Ins. Co. v. Provine, 321 So. 2d 311, 314 (Miss. 1975); Mississippi State Highway Comm'n v. Owen, 308 So. 2d 228, 231 (Miss. 1975); Bynum v. Mandrel Indus., Inc., 241 So. 2d 629, 633 (Miss. 1970).

[137] Early-Gary, Inc. v. Walters, 294 So. 2d 181, 185 (Miss. 1974); *accord*, Crawford v. Worth, 447 F.2d 738, 740 (5th Cir. 1971).

[138] Vick v. Cochran, 316 So. 2d 242, 250 (Miss. 1975); Jackson v. State, 309 So. 2d 520, 523 (Miss. 1975). The trial court has the discretionary power to determine whether the facts contained in a hypothetical question propounded to the expert are to be found in the record. Cadillac Corp. v. Moore, 320 So. 2d 361, 366 (Miss. 1975); Hinds-Rankin Metropolitan Water & Sewer Ass'n v. Reid, 256 So. 2d 373, 377 (Miss. 1971).

[139] *See* Prewitt v. State, 106 Miss. 82, 88-89, 63 So. 330, 332 (1913) (hypothetical question on accused's insanity was objectionable since it improperly called for an opinion based, without distinguishing the two, on both the witness' personal knowledge and facts presented at trial). *But see* Providence Washington Ins. Co. v. Weaver, 242 Miss. 141, 152-

The expert's opinion is probative only if it is stated in terms of probabilities, not possibilities,[144] particularly in the area of medical opinions.[145] Furthermore, the rule in Mississippi is that a medical expert may not base an opinion on medical histories furnished to him by third persons.[146]

Of course, whether an expert opinion "is based upon and supported by facts and similarities of experience sufficient to sustain it, is a question of law for the court."[147] If an opinion based on unproven facts is contradicted by actual mechanical or scientific proof, the opinion evidence must yield to the latter.[148] A final, well-established safeguard lies

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53, 133 So. 2d 635, 650 (1961) (allowing, without a hypothetical, opinion testimony of experts based partially on observed testimony of other witnesses since there was no conflict in the evidence); Reed v. State, 62 Miss. 405, 409 (1884) (same).

[140] Cadillac Corp. v. Moore, 320 So. 2d 361, 366 (Miss. 1975); Jackson v. Smith, 309 So. 2d 520, 523 (Miss. 1975).

[141] Magnolia Hosp. v. Moore, 320 So. 2d 793, 799 (Miss. 1975); Jackson v. Smith, 309 So. 2d 520, 523 (Miss. 1975). It is within the trial court's discretion to determine whether the question has its basis in the record. See note 138 *supra*.

[142] Alman Bros. Farms & Feed Mills, Inc. v. Diamond Laboratories, Inc., 437 F.2d 1295, 1299 (5th Cir. 1971). Still, the question should include "substantially all" facts about the subject of the opinion, T. McElroy, *supra* note 38, § 37, at 176, particularly if the facts are undisputed. Cates v. States, 111 Miss. 106, 123-24, 157 So. 95, 100 (1934).

[143] State *ex rel.* Richardson v. Edgeworth, 214 So. 2d 579, 585 (Miss. 1968). *See also* Gulf Ins. Co. v. Provine, 321 So. 2d 311, 314 (Miss. 1975) (facts should form a "reasonably accurate basis" for opinion).

[144] *See* Gulf Ins. Co. v. Provine, 321 So. 2d 311, 314 (Miss. 1975) (opinion is valid if it is probably true).

[145] Magnolia Hosp. v. Moore, 320 So. 2d 793, 799 (Miss. 1975) (in the area of medical malpractice, opinion must be based on "credible evidence" and stated "with reasonable medical certainty"). For a more detailed examination of expert medical testimony, see Adam, *Expert Medical Testimony in Mississippi*, 40 Miss. L.J. 241 (1969).

[146] Magnolia Hosp. v. Moore, 320 So. 2d 793, 799 (Miss. 1975); Dennis v. Prisock, 221 So. 2d 706, 711 (Miss. 1969). *But see* Wild v. Bass, 252 Miss. 615, 626-27, 173 So. 2d 647, 651 (1965). The *Wild* court did not allow the testimony of a doctor who was consulted solely for purposes of procuring possible testimony and whose opinion was based on medical history of the child's mother. Yet it was suggested that such an opinion might be admissible, even though based on out of court information of a third person, if the information were provided to the physician in the course of treatment. *Id.* For a discussion of the admissibility of learned treatises to support or impeach expert testimony, see 37 Miss. L.J. 327 (1966).

[147] Gulf, M. & O.R.R. v. Hollingshead, 236 So. 2d 393, 396 (Miss. 1970).

[148] Gulf Ins. Co. v. Provine, 321 So. 2d 311, 315 (Miss. 1975); Gulf, M. & O.R.R. v. Hollingshead, 236 So. 2d 393, 397 (Miss. 1965).

in the principle that a jury has the option to accept or reject the credibility of expert testimony.[149]

In summary, the use of expert opinion testimony and the qualifications of one allowed to provide the needed opinion do not significantly differ in state and federal forums. There is, however, a more restricted use of expert opinion in the state court with regard to the basis of the opinion and the method by which it may be elicited.

RULE 704. OPINION ON ULTIMATE ISSUE[150]

Rule 704 might well be termed an emancipation proclamation. It expressly abolishes the ultimate issue rule and frees the federal courts from its restrictive effects. The Advisory Committee affirmatively stated that the purpose of the rule is "to allay any doubt on the subject."[151]

To a degree, the rule is also a restatement. It embodies a previously discernible trend in the federal system toward complete abandonment of restrictions on ultimate issue testimony in appropriate situations.[152] While it is intended to be equally applicable to lay and expert opinion testimony, it seems reasonable to anticipate more ready judicial application of the rule to experts than to nonexperts.

The ultimate issue rule proscribes expressions of opinion by a witness, lay or expert, on any factual issue or combination of issues dispositive of the litigation, based on the assumption that statements of those opinions by a witness would "invade the province" or "usurp the function" of the trier of fact.[153] Judicial attempts to apply it—or perhaps more accurately, to circumvent it—have led to verbal circumlocutions and semantical distinctions.[154] As a result, its application has been unavoidably irrational. The ultimate issue rule is "unduly restrictive, difficult of application, and generally [serves] only to deprive the trier of fact of useful information."[155]

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[149] Price v. Admiral Corp., 527 F.2d 412, 415 (5th Cir. 1976); Mississippi State Highway Comm'n v. Smith, 240 So. 2d 704, 705 (Miss. 1970). In addition, a party may request that unreasonable opinion testimony be excluded. Mississippi State Highway Comm'n v. Ramsey, 253 Miss. 747, 750, 179 So. 2d 267, 268 (1965).

[150] FED. R. EVID. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See Criminal Law 🔑 486; Evidence 🔑 55; Federal Civil Procedure 🔑 1194-95.

[151] FED. R. EVID. 704, Advisory Comm. Notes.

[152] J. COTCHETT & A. ELKIND, *supra* note 13, at 116; *see, e.g.*, Northrop Architectural Sys. v. Lupton Mfg. Co., 437 F.2d 889, 891-92 (9th Cir. 1971) (per curiam) (citing the proposed rules of evidence); Barnes v. Omark Indus. Inc., 369 F.2d 4, 7 (8th Cir. 1966) ("expert testimony is not objectionable because it invades the province of the jury"); Steinberg v. Indemnity Ins. Co. of N. America, 364 F.2d 266, 274 (5th Cir. 1966) (physician's testimony that malpractice had been committed was admissible); Mazer v. Security Ins. Group, 368 F. Supp. 418, 422 n.4 (E.D. Pa. 1973) (ultimate issue rule is not followed where subject is "beyond the knowledge of ordinary laymen"), *aff'd*, 507 F.2d 1338 (3d Cir. 1975).

[153] 3 WEINSTEIN'S EVIDENCE ¶ 704[01], at 704-4 (1976); *see, e.g.*, Baptiste v. Boatmen's Nat'l Bank, 148 S.W.2d 743, 744 (Mo. 1941) (per curiam) (citing Heinbach v. Heinbach, 274 Mo. 301, 202 S.W. 1123 (1918)).

The spirit of rule 704 is consonant with the central purpose of all of the federal rules concerning opinion testimony "that opinions should be admitted when they are helpful to the trier of fact."[156] The rule effects a complete philosophical departure from the existing ultimate issue concept. While the ultimate issue rule and its underlying concern about "jury invasion and usurpation" are wholly negative, rule 704 is positively formulated in terms of aiding the trier of fact to carry out its function rather than in terms of usurpation of that function. This positive approach has been lauded as a valuable contribution to litigation.

> Abolition of the rule . . . stops the resort to indirect means to bring the prohibited matter to the jury's attention, and most importantly, it allows the jury to receive the full benefit of a witness' judgment. Both lay and expert witnesses may testify in a more natural manner uninterrupted by technical objections which interfere with the flow of the trial but do not further the cause of truth.[157]

Safeguards against abuse of the liberalized rule are built into the other Article VII rules and into the adversary system itself. These safeguards should relieve the concerns of those who still adhere to the jury invasion theory. For example, rules 701 and 702 mandate usefulness to the trier of fact. If the trier is competent to draw the proper inferences and reach a logical conclusion independently, opinion testimony ceases to have utility and, under rules 701 and 702, should not be admitted. Additionally, any testimony calculated to cause "undue delay" and to constitute a "waste of time" may be excluded under rule 403. Even when such opinions are admitted, rule 705 allows searching cross-examination to test their underlying facts or data.[158] Finally, apart from the rules of evidence, the sensible answer to the "jury invasion" concern is the prerogative—indeed, the duty—of the trier of fact to weigh all opinions per se and as a part of all the evidence.

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[154] *See, e.g.*, Kennelley v. Traveler's Ins. Co., 273 F.2d 479, 482 (5th Cir. 1960) (creating the exception which allows an expert witness to state an opinion on an ultimate fact); Meredith v. United States, 238 F.2d 535, 543 (4th Cir. 1956) (abandoning distinction between opinions on ultimate facts and opinions on evidentiary facts); Peoples Gas Co. v. Fitzgerald, 188 F.2d 198, 201 (6th Cir. 1951) (allowing expert to testify to facts outside the realm of a layman's common knowledge).

[155] FED. R. EVID. 704, Advisory Comm. Notes.

[156] 11 MOORE'S FEDERAL PRACTICE § 704.10, at VII-64 (2d ed. 1976).

[157] 3 WEINSTEIN'S EVIDENCE ¶ 704[01], at 704-10 (1976).

[158] FED. R. EVID. 705, Advisory Comm. Notes.

The Fifth Circuit has given rule 703 its full effect and supported its position by citing to the unequivocal language of the rule.[159] While the court has cautioned against admission of legal conclusions,[160] it has indicated the reversal will be proper only upon a gross abuse of discretion. "[A]dmissibility of an expert's conclusion depends on the nature of the issue and the circumstances of the case, and involves a large element of judicial discretion."[161]

While witnesses in federal courts have been emancipated from the restrictions of the ultimate issue rule, the rule remains viable in Mississippi, based on the "invasion of the province of the jury" and "violation of the right to trial by jury" arguments. The Mississippi Supreme Court continues to prohibit opinion testimony, lay[162] and expert,[163] on the ultimate issue to be decided by the trier of fact.

Application of the rule, however, has proved difficult. In some cases, the court has allowed opinion testimony on issues so critical to the ultimate decision that one might be led to conclude that Mississippi adheres to the federal position. In *Great Southern Box Co. v. Barrett*,[164] the court offhandedly observed that "[i]t is true that the eyewitnesses all stated that [the plaintiff] did nothing to contribute to the accident and was driving in a normal and careful manner; but such opinions and conclusions of a witness bind no one."[165] It should be noted that, even though their admissibility was not the direct issue on appeal, the court did not label these opinions as inadmissible. They were based on first-hand knowledge and were necessary to enable the witnesses to express what they saw. In reality, their statements constituted opinions on the ultimate issue, but the jury was not bound by them. This position does not significantly differ from that of the federal courts. Similarly, in *Early-Gray, Inc. v. Walters*,[166] the plaintiff was injured when he struck the bottom of a ketchup bottle in an attempt to loosen the cap. The plaintiff's expert was allowed to state an opinion that the bottle broke because "there was a defect in the bottle and . . . the defect occurred prior to the time it was packed for shipment by [the defendant]."[167] Although the technical proof requirements also included a necessity for proof that the defect was unreasonably dangerous, certainly this opinion testimony bore directly on the ultimate issue of the case.

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[159] *E.g.*, United States v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977); United States v. Smith, 550 F.2d 277, 281 (5th Cir. 1977).

[160] *See, e.g.*, United States v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977).

[161] *Id.* at 1203-04 (quoting United States v. McCoy, 539 F.2d 1050, 1063 (5th Cir. 1976)). The court has likewise refused to reverse a lower court's denial of admission of such testimony absent a showing of abuse of discretion. *See* Acrement v. Southern Pac. Transp. Co., 517 F.2d 729, 732 (5th Cir. 1975).

[162] *See, e.g.*, Shivel v. Ferguson, 259 So. 2d 123, 126 (Miss. 1972) (witness' opinions on who had the right of way before auto accident invades province of jury); Lynn v. Suthoff, 220 So. 2d 593, 596 (Miss. 1969) (police officer can testify to appearance of accident scene on his arrival, but his opinion about how accident happened invades province of the jury); Jones v. Welford, 215 So. 2d 240, 242 (Miss. 1968) (same).

[163] *See, e.g.*, Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 492, 148 So. 2d 693, 695 (1963) (accidentologist's opinion on who was at fault in automobile accident was clear invasion of the province of the jury).

[164] 231 Miss. 101, 94 So. 2d 912 (1957).

[165] *Id.* at 112, 94 So. 2d at 916.

[166] 294 So. 2d 181 (Miss. 1974).

The growing need for expert opinion in our technological age, combined with the safeguards of relevancy and cross-examination, indicate that the time has come for the Mississippi Supreme Court to reexamine its position on the ultimate issue rule. The *Walters* case, as well as other products liability cases,[168] may be a sign that the court has begun to relax the rule.

RULE 706. COURT APPOINTED EXPERTS[169]

In its notes to rule 706, the Advisory Committee observed that "[t]he inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. . . . Hence the problem becomes largely one of detail."[170] These words embody the warrant for and the purpose of rule 706, which is a reaffirmation of a trial court's prerogative recognized at common law and previously exercised by federal courts.[171] The rule is, however, written very specifically since its purpose is to establish procedural uniformity for appointment and compensation of experts while adequately protecting the rights of litigants. As written, rule 706 should obviate concerns about "[t]he practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation."[172] A somewhat ironic but certainly beneficial effect may be that the mere availability of the rule will diminish the need for its use.[173]

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[167] *Id.* at 183.

[168] *See, e.g.*, Ford Motor Co. v. Dees, 223 So. 2d 638, 641 (Miss. 1969) (expert testimony held not an ultimate answer to the issues for the jury).

[169] FED. R. EVID. 706 provides:

> (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.
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> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
>
> (c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
>
> (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

See Federal Civil Procedure 🔑 1221; Witnesses 🔑 4.

Rule 706 has been criticized on the theory that the expert's "aura of infallibility"[174] in the mind of the lay juror will be magnified by the court's seeming confidence in his opinion as expressed by its appointment of him. Yet, disclosure of the witness' appointment need not be made. While disclosure is authorized, it is not mandatory and is expressly made subject to the court's discretion.[175]

By its own terms, the rule clearly applies only to appointment of experts and does not extend to lay witnesses. However, rule 614(a), which applies in criminal proceedings as well as civil, authorizes the calling of witnesses by the court.

The appointive mechanism is set in motion by a show cause order initiated either by the court or on motion of a party.[176] Even though the court may request nominations of experts, it is not obligated to make its designation from the parties' nominees even if they agree on the same expert. The expert is accorded the right of refusal, and he will not be appointed without his consent. Once he has agreed to the appointment, his duties are prescribed by the court in writing or at a conference with the parties. The expert's subsequent findings are made known to all parties in interest, thus removing the element of surprise. The rule makes clear that any party may depose the expert, that the court or any party may call him as a witness, and that any party may subject him to cross-examination, whether or not that party called him. Underlying the entire process is the discretion of the court, not only in defining the expert's duties, but in the threshold determination of whether any appointment is appropriate under the circumstances.

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[170] FED. R. EVID. 706, Advisory Comm. Notes.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] FED. R. EVID. 706(c).

[176] *Id.* 706(a). See note 169 *supra*.

An obvious postappointment consideration is the degree to which the parties are permitted to communicate with the expert during performance of his assigned tasks. While the rule does not address this question, a degree of control is provided since "the court does have the authority to warn against undue communication with the parties in his written instructions to the expert."[177]

Subdivision (b) of the rule authorizes the court to fix "reasonable compensation" to the expert and prescribes the sources of funds from which this compensation should be made. In "criminal cases and civil actions and proceedings involving just compensation under the fifth amendment," the source is said to be "funds which may be provided by law." The intended source in criminal cases is presumably the Criminal Justice Act of 1964.[178] The categorization "just compensation under the fifth amendment" refers, primarily, to condemnation cases.[179] Obviously, to require the expert's compensation to be borne by the condemnee, who is almost always the "losing" party, would effect a reduction in his net recovery and thus breach the constitutional guaranty of "just compensation." The courts will more than likely look to the Judiciary Appropriation Act[180] as the "provided by law" source of funds in these cases.

In ordinary federal civil litigation, where the parties provide their own experts, the general rule is that only the expert's per diem attendance fee, mileage, and subsistence allowance are susceptible of being considered taxable costs.[181] The party using the expert customarily bears all additional expense. With regard to the "other civil actions and proceedings" category of subdivision (b), it is questionable whether this general rule should be applied in instances of the court appointed expert. It would seem that the entirety of his expenses should instead be treated as taxable costs.[182]

Under subdivision (c), the court in its discretion may authorize disclosure that the expert was court-appointed. Implicit in this authority is the corresponding prerogative not to authorize disclosure when the trial court feels the interests of a fair trial demand it. The rule vests no right in the litigants themselves to make disclosure, either jointly or unilaterally.

Subdivision (d) is a positive disavowal of any intent that rule 706 should infringe upon the litigants' right to call their own experts.[183] Nonetheless, it is probable that instances will arise where such evidence will be excluded under the "undue delay, waste of time, or needless presentation of cumulative evidence" considerations authorized by rule 403.

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[177] 11 MOORE'S FEDERAL PRACTICE § 706.10, at VII-84 (2d ed. 1976).

[178] 18 U.S.C. § 3006A (Supp. V 1975).

[179] U.S. CONST. amend. V provides in pertinent part, "[N]or shall private property be taken for public use, without just compensation."

[180] 28 U.S.C. §§ 601-611 (Supp. V 1975).

[181] FED. R. CIV. P. 54(d); *see* 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[5-3], at 1734 (2d ed. 1976).

[182] 11 MOORE'S FEDERAL PRACTICE § 706.20, at VII-86 (2d ed. 1976).

Application of rule 706 is illustrated by *United States v. Articles . . . Provimi*,[184] an in rem action by the Food and Drug Administration to dispose of certain animal feeds that contained an unacceptable amount of contaminants. Upon finding that the parties had not provided sufficient background information to allow him to render a judgment, the trial judge appointed an independent expert to study and analyze the methods of blending such feeds.[185] Each party was assessed one-half the costs of the court appointed expert.[186]

In Mississippi the courts are given statutory authority to appoint experts to advise whether an accused charged with a felony is competent to stand trial[187] and to perform blood tests in illegitimacy proceedings.[188] There appears to be no other instance in which Mississippi courts have exercised what the federal courts have always deemed to be an inherent right—to appoint experts and receive their opinions into evidence. The authors can only conclude that either the state trial judges have questioned such a right and shunned its use or, if the right has in fact been invoked, there has been no challenge to its invocation at the appellate level.

CONCLUSION

Due to increased formal educational opportunities and day-to-day exposure to learning stimuli in this technological society, today's jurors have a breadth of experience, information, and perception that greatly surpasses that possessed by jurors of only a few decades ago. The quality of state juries has also been enhanced by random selection of jurors[189] rather than use of the "professional juror" of the past. The removal of previous exclusions based on race, color, religion, sex, and economic status has produced juries that represent a cross section of the community and has increased the jury's depth of perception as a whole. The result of these judicial reforms has been improvement in the quality of the jury for performance of its ultimate purpose—weighing the evidence and deciding the facts. Modern juries are capable of assimilating and discerning the facts from both testimonial and demonstrative evidence.

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[183] FED. R. EVID. 706(d). See note 169 *supra*.

[184] 425 F. Supp. 228 (D.N.J. 1977).

[185] *Id.* at 231.

[186] *Id.*

[187] MISS. CODE ANN. § 99-13-11 (1972).

[188] *Id.* § 93-9-23.

[189] *See id.* § 13-5-2 (Supp. 1977).

They are also capable of bringing their background knowledge to bear upon opinion testimony and affording it the weight to which it is entitled, without treating such opinions with dogmatic reverence. Article VII of the Federal Rules of Evidence manifests a renewed confidence in the jury system. It is hoped that Mississippi state courts will show a similar trust by adopting more liberalized rules for the admission of opinion testimony.

THE ENIGMA OF HEARSAY

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INTRODUCTION

Many lawyers and judges view hearsay in the same manner that Winston Churchill viewed the action of Russia in 1939 when he said, "It is a riddle wrapped in a mystery inside an enigma."[1] While the hearsay rule is probably the most widely known rule of evidence—to both lawyers and laymen—it is surely the most frequently misunderstood and misapplied. Although a substantial part of the law of evidence is concerned with hearsay problems, the greater part is devoted to the exceptions rather than the rule,[2] and many lawyers who are thoroughly familiar with the exceptions know little about the rule itself.[3]

The rule against hearsay was a recent development of the common law,[4] and its origin is undoubtedly linked to the development of the jury system.[5] In order to test a witness' perception, memory, and narration, the witness ideally should testify under oath, subject to cross-examination in the presence of the trier of fact. It is generally conceded that cross-examination is the most important of these considerations. Thus, inability to cross-examine the witness about his out-of-court statement is the primary justification for the exclusion of hearsay.[6] Nonetheless, as the many exceptions to the rule reveal, there are other factors which provide certain hearsay with sufficient reliability and trustworthiness to warrant admissibility despite the absence of these ideal safeguards.

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[1] J. BARTLETT, FAMILIAR QUOTATIONS 920 (14th ed. 1968) (quoting Winston Churchill from a radio broadcast on October 1, 1939).

[2] 4 WEINSTEIN'S EVIDENCE ¶ 800[01], at 800-8 (1975).

[3] *Id.*

[4] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 244, at 580-81 (2d (E. Cleary) ed. 1972); 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN

In formulating the Federal Rules of Evidence, the drafters considered three approaches to hearsay: (1) abolish the exclusionary rule and admit all hearsay; (2) abandon the present system of class exceptions in favor of individual treatment in each case by the trial judge; or (3) retain the common law exclusionary rule and its exceptions.[7] The admission of all hearsay, while recognized as the most expedient solution, was not adopted because it would require a complete disregard of the traditional safeguards. Furthermore, both the Model Code of Evidence[8] and the Uniform Rules of Evidence[9] failed to generate acceptance for similar approaches. The suggestion that trial judges make individual determinations was rejected because of the potential for abuse in a system that would allow such complete judicial discretion.[10] The drafters finally chose to retain the common law approach since it preserved past values and experiences and could also provide impetus for future growth and development.

The purpose of this Article is to provide a survey of the federal and Mississippi law of hearsay evidence. Since it covers the hearsay rule and all of its exceptions, the Article is broad. The enormous amount of material on hearsay prevents a detailed discussion of each aspect or an exhaustive citation of authority. The authors hope that this survey approach will touch upon the most important aspects of hearsay and that the authorities cited will serve as a catalyst for a more complete inquiry.

The format of this Article will follow the organization of Article VIII of the Federal Rules of Evidence. Each section will begin with a discus-

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TRIALS AT COMMON LAW § 1364, at 16 (3d ed. 1940) (the rule against hearsay crystallized between 1675 and 1690).

[5] *See* C. MCCORMICK, *supra* note 4, § 244, at 579-81.

[6] *Id.* § 245, at 583.

[7] FED. R. EVID. art. VIII, Advisory Comm. Notes. In the many proposals for reform of the hearsay rule, no one has ever seriously suggested a bar to all hearsay. 4 WEINSTEIN'S EVIDENCE ¶ 800[01], at 800-11 (1975).

[8] MODEL CODE OF EVIDENCE 503 (1942).

[9] UNIFORM RULES OF EVIDENCE 63 (1953).

[10] FED. R. EVID. art. VIII, Advisory Comm. Notes.

sion of the federal rule and conclude with a discussion of corresponding Mississippi law. In dealing with hearsay concepts, it should be noted that the use of hearsay evidence in criminal cases may, in some instances, have a substantially different impact than in civil cases. In addition to the custodial and self-incrimination considerations applicable to an accused, the confrontation clause of the sixth amendment[11] provides another constitutional dimension. Specific mention of the right to confront accusing witnesses will occur only sporadically throughout this Article; this should not, however, be taken as an indication that it is not a matter for consideration. To the contrary, the right of confrontation must always be considered when evidence is offered against an accused in a criminal trial.[12]

RULE 801. DEFINITIONS[13]

Subdivisions (a), (b), and (c) of rule 801 define, respectively, the terms "statement," "declarant," and "hearsay" as used in the federal rules on hearsay. Subdivision (d), while not truly a definition, describes certain prior statements by a witness and admissions by a party-opponent that are expressly excluded from the definition of hearsay.

Rule 801(a). Statement[14]

While the definition of statement assumes importance because the term is used in the definitions of declarant[15] and hearsay,[16] it is important for two additional reasons. First, the definition clearly includes assertive nonverbal conduct,[17] as well as the more obvious oral and written assertions; second, it makes clear that nonverbal conduct is not an assertion unless intended to be one.[18]

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[11] U.S. CONST. amend. VI. Mississippi's Constitution also provides that an accused has the right to confront a witness against him. MISS. CONST. art. 3, § 26.

[12] *See* 4 WEINSTEIN'S EVIDENCE ¶ 800[04], at 800-18 to -26 (1975). *See generally* FED. R. EVID. art. VIII, Advisory Comm. Notes; C. MCCORMICK, *supra* note 4, § 252, at 604-07; Comment, *Criminal Procedure in Mississippi: A Summary of the Right to Assistance of Counsel, the Right of Confrontation, and Juvenile Quasi-Criminal Proceedings*, 47 MISS. L.J. 91, 106-23 (1976).

[13] FED. R. EVID. 801.

[14] *Id.* 801(a) provides: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

[15] *Id.* 801(b).

[16] *Id.* 801(c).

[17] A typical example of assertive nonverbal conduct that constitutes a hearsay statement is found in United States v. Ross, 321 F.2d 61, 69 (2d Cir.) (out-of-court declarant identified names of and numbers assigned to salesmen by pointing to a list of them), *cert. denied*, 375 U.S. 894 (1963).

[18] FED. R. EVID. 801(a), Advisory Comm. Note. An example of conduct not intended to be an assertion, and therefore not hearsay, is found in Cole v. United States, 327 F.2d

The definition of hearsay statements does not include assertions which are implied from nonverbal conduct, thus resolving one of the most troublesome issues surrounding the common law of hearsay.[19] The implied assertion problem is illustrated by the famous will contest case of *Wright v. Tatham*.[20] In *Wright*, letters written to the testator were offered to prove the testator's sanity by an inference that the authors would not have written the letters unless they believed that the testator was sane. The letters, though not intended as assertions, were excluded as hearsay since they were offered to prove the actors' beliefs in the implied assertion.[21]

As in *Wright*, older cases favored the exclusion of nonassertive conduct on hearsay grounds;[22] more recent cases, however, have admitted evidence of such conduct.[23] Following the modern trend, the federal rules do not include nonassertive conduct within the definition of a hearsay statement. Therefore, if relevant, evidence of such conduct is admissible just as any other circumstantial fact.[24] In support of this position the Advisory Committee stated:

> Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but . . . these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity.[25]

360, 361 (9th Cir. 1964) (to establish robbery by intimidation, witness testified that bank teller was pale and shaking).

[19] 11 MOORE'S FEDERAL PRACTICE § 801.10, at VIII-31 to -32 (1976).

[20] 112 Eng. Rep. 488 (Exch. Ch. 1837).

[21] *Id.*

[22] *See, e.g.,* People v. Bush, 300 Ill. 532, 133 N.E. 201, 203 (1921) (evidence that institution in which witness was placed did not segregate her as was done with venereal cases inadmissible on issue of whether she had venereal disease).

[23] *See, e.g.,* State v. Izzo, 94 Ariz. 226, 383 P.2d 116, 118 (1963) (evidence that wife did not return home the night before her murder admissible on the issue of whether she feared her accused husband).

[24] Silence, a specialized aspect of the conduct-as-hearsay problem, has divided courts over the admissibility of a failure to speak or act. C. MCCORMICK, *supra* note 4, § 250, at 600. *Compare* Cain v. George, 411 F.2d 572, 573 (5th Cir. 1969) (absence of complaints from other guests who had occupied motel room admissible on issue of whether heater was defective) *with* Stokley-Van Camp, Inc. v. Ferguson, 271 Ala. 120, 122 So. 2d 356, 359 (1960) (absence of claims by other customers of food poisoning not admissible on issue of care exercised by defendant). Under rule 801(a), silence should be treated as any other type of conduct; however, the instances in which silence is classified as assertive conduct will probably be rare. Also, under rule 801(d)(2)(B), a party-opponent's silence or failure to deny a statement may result in the statement's admissibility as a nonhearsay admission.

[25] FED. R. EVID. 801(a), Advisory Comm. Note.

The admissibility of nonverbal conduct will depend on the actor's intention. If no assertion was intended, the conduct is not hearsay. Rule 801(a) places the burden of proof on the party contending that an assertive intention existed, and any ambiguous or doubtful case should be resolved against the party claiming an assertive intent and in favor of admissibility.[26]

Rule 801(b). Declarant[27]

Under the federal rules, a declarant is defined simply as a person who makes a statement.[28] The declarant may or may not be a witness at the trial or hearing.[29] If not a witness, the declarant's statement clearly will be hearsay if offered in evidence to prove the truth of the matter asserted.[30] Even if the declarant is a witness, evidence of an out-of-court statement by him will be hearsay if offered to prove the truth of the matter asserted.[31] Nonetheless, if he has personal knowledge[32] of the subject matter of the statement, his testimony about the subject matter itself does not involve hearsay.[33] If the witness has no personal knowledge, the admissibility of his testimony about the statement's subject matter will depend on whether it is classified as admissible hearsay.[34]

Rule 801(c). Hearsay[35]

Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[36] This definition is not novel; it is a familiar approach to defining the frequently misunderstood concept of hearsay.[37] The definition seeks to limit the term "hearsay" to out-of-court assertions which are offered to prove the facts asserted as if a witness, with personal knowledge of those facts, were present and testifying about them. The principal reason for the exclusion of hearsay, upon which this definition is based, is the absence of the normal safeguards of oath, presence, and cross-examination of the out-of-court declarant.[38]

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[26] *Id.* Some commentators, however, would place the burden on the party claiming that no assertive intention existed. Such a position is based on the theory that the danger of insincerity is decreased only where there is no possibility that the declarant intended to make an assertion. *See, e.g.,* Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence,* 14 STAN. L. REV. 682, 686-88 (1962) (assertive intent of the actor must be determined, and cross-examination by the objecting party is a useful vehicle); Maguire, *The Hearsay System: Around and Through the Thicket,* 14 VAND. L. REV. 741, 766 (1961) (burden of proof should be placed on the objecting party to establish, in a debatable case, the assertive intention of the actor).

[27] FED. R. EVID. 801(b) provides: "A 'declarant' is a person who makes a statement."

[28] *Id.* There is no Advisory Committee Note to this subdivision.

[29] 11 MOORE'S FEDERAL PRACTICE § 801.20, at VIII-32 (1976).

[30] FED. R. EVID. 801(c).

[31] However, *id.* 801(d) classifies certain prior statements by a witness and admissions by a party-opponent as nonhearsay.

[32] *See generally id.* 602.

[33] 11 MOORE'S FEDERAL PRACTICE § 801.20, at VIII-33 (1976).

[34] *Id.* at VIII-32.

[35] FED. R. EVID. 801(c) provides: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See Criminal Law 🔑 419; Evidence 🔑 314-24.

[36] FED. R. EVID. 801(c).

Most trial lawyers have observed, if not made, hearsay objections to out-of-court statements without regard to the purpose for which the evidence was offered. Nevertheless, statements offered for any reason other than to prove the truth of the facts asserted simply are not hearsay.[39] For example, an out-of-court statement may be offered merely to prove the existence of the statement,[40] or to show the understanding of or effect on a hearer or reader.[41] Additionally, such statements are admissible to show the declarant's feeling or state of mind,[42] intent,[43] knowledge,[44] or insanity.[45] When offered for one of these purposes, a statement should not be classified as hearsay.

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[37] *Id.*, Advisory Comm. Note; *see* C. McCormick, *supra* note 4, § 246, at 584; 5 J. Wigmore, *supra* note 4, § 1361, at 2; 6 *id.* § 1766, at 5.

[38] C. McCormick, *supra* note 4, § 246, at 585; *see* Fed. R. Evid. 801(c), Advisory Comm. Note.

[39] Anderson v. United States, 417 U.S. 211, 219 (1974); Giblin v. United States, 523 F.2d 42, 45 (8th Cir. 1975); United States v. Carter, 491 F.2d 625, 628 (5th Cir. 1974); La Placa v. United States, 354 F.2d 56, 59 (1st Cir. 1965), *cert. denied*, 383 U.S. 927 (1966); Pauling v. News Syndicate Co., 335 F.2d 659, 664 (2d Cir. 1964), *cert. denied*, 379 U.S. 968 (1965); Handshoe v. Daley, 211 Miss. 189, 193, 51 So. 2d 230, 231-32 (1951).

[40] *E.g.*, Creaghe v. Iowa Home Mut. Cas. Co., 323 F.2d 981, 984 (10th Cir. 1963).

[41] *See, e.g.*, United States v. Brooks, 473 F.2d 817, 818 (9th Cir. 1973) (per curiam) (it is not improper to allow a witness to state what he understood by a statement made to him by declarant); Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 82 (7th Cir.) (letters received by defendant held admissible, not to prove facts contained therein, but to show information on which defendant acted), *rev'd on other grounds*, 340 U.S. 558 (1950).

[42] *See, e.g.*, Betts v. Betts, 3 Wash. App. 53, 473 P.2d 403, 407-09 (1970) (statement by child in custody case admissible to show child's state of mind). Frequently, courts fail to distinguish between nonhearsay declarations offered to prove state of mind circumstantially, and declarations which actually assert the declarant's state of mind. The latter are hearsay, but are usually admissible under the "declaration of present mental state" exception. C. McCormick, *supra* note 4, § 294, at 694.

[43] United States v. Brown, 411 F.2d 1134, 1137 (10th Cir. 1969); Hooper-Holmes Bureau v. Bunn, 161 F.2d 102, 106 (5th Cir. 1947).

[44] United States v. Frank, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); Phillips v. United States, 356 F.2d 297, 307 (9th Cir.), *cert. denied*, 384 U.S. 952 (1966).

[45] *See, e.g.*, People v. Wolf, 61 Cal. 2d 795, 394 P.2d 959, 968, 40 Cal. Rptr. 280 (1964) (defendant's statement that he knew it was wrong to kill his mother admitted not to prove the crime but to prove legal sanity); Young v. Colorado Nat'l Bank, 148 Colo. 104, 365

Rule 801(c) embodies the concept that, despite the declarant's presence in court, his out-of-court statements constitute hearsay and are thus inadmissible unless an exception is applicable. As previously stated, however, if the declarant has personal knowledge of the subject matter of the statement, he may testify about that matter.[46]

An occasional, but unnecessary, problem concerning the classification and admissibility of hearsay has been the effect of the presence or absence of the party against whom an out-of-court statement is offered.[47] Despite the unfortunate language in some cases,[48] there is no relationship between the concept of hearsay and the presence or absence of the adverse party.[49] The adverse party's presence fails to compensate for the lack of oath, confrontation, and cross-examination of the declarant; therefore, his mere presence does not make the statement nonhearsay or admissible. Nor does the adverse party's absence automatically make an out-of-court statement hearsay or inadmissible. Since rule 801 makes no reference to the adverse party's presence or absence, that issue is not a consideration for determining hearsay under the federal rules and should not be a consideration under any proper interpretation or application of the hearsay rule.

In Mississippi no attempt has been made to formulate a definition of the term "declarant." Mississippi, however, follows the established concept that a witness' out-of-court statements are hearsay, even though the witness testifies in court.[50] Similarly, Mississippi courts rec-

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P.2d 701, 710 (1961) (party's pretrial statements were admissible as an indication of his mental state).

[46] Fed. R. Evid. 601-602. See notes 27 through 34 and accompanying text *supra*.

[47] *See* C. McCormick, *supra* note 4, § 246, at 586 (the practice of objecting to out-of-court statements because they were not made in the presence of the adverse party is a remarkably persistent bit of courthouse folklore). *See also* Mason & Hengen, *The Hearsay Rule in Mississippi: Out of the Presence of the Adverse Party—In the Presence of the Adverse Party*, 47 Miss. L.J. 423 (1976).

[48] *See, e.g.*, Walker v. State, 135 Miss. 422, 427, 100 So. 9, 9-10 (1924) (officers' testimony about out-of-court statements made outside presence of defendant was pure hearsay); Liuzzo v. McKay, 396 Pa. 183, 152 A.2d 265, 266 (1959) (statement by observer to police officer was hearsay because the adverse party was not present when the statement was made).

[49] C. McCormick, *supra* note 4, § 246, at 586. The adverse party's presence or absence may be significant in a few instances, for example, when the statement is relied upon to charge him with notice or when his failure to speak is the basis of an admission by silence. In such instances, presence or absence is significant only because it affects the statement's relevance to the issue of notice or admission by silence. *Id.*

[50] *See, e.g.*, Ideal Cement Co. v. Killingsworth, 198 So. 2d 248, 251 (Miss. 1967) (witness' statement about defendant's speed prior to accident held hearsay); Moore v. State, 102 Miss. 148, 157, 59 So. 3, 4 (1912) (where identity of criminal was involved, testimony that witness told another that she recognized the person as the defendant was hearsay). See notes 84 through 92 and accompanying text *infra* for discussion of Mississippi law on prior statements.

ognize that hearsay may include oral[51] or written[52] statements or nonverbal conduct,[53] although "statement" has not been precisely defined. As in most other jurisdictions, the hearsay issue has generally gone unrecognized when evidence of nonverbal conduct has been offered. No Mississippi case was found in which the court discussed the conduct-as-hearsay problem or the difference between assertive and nonassertive conduct. Nonetheless, evidence of a person's nonverbal conduct is frequently offered as evidence in Mississippi courts, and occasionally the hearsay issue is raised. For example, in *Odom v. Luehr*,[54] a suit to recover damages for trees unlawfully cut, the hearsay issue was recognized and raised. Hubbard and Gilbert, two men employed to cut the trees, had pointed out to Mason the trees they cut. Mason, who was not present when the trees were cut, subsequently testified that 936 trees were cut. The Mississippi Supreme Court held there would be merit in the hearsay objection to Mason's testimony if Hubbard and Gilbert had not appeared and testified that they pointed out to Mason the trees which had been cut and which he counted. Since the conduct of Hubbard and Gilbert was assertive in nature, that is, the equivalent of orally stating, "We cut 936 trees," the court's classification of Mason's testimony as hearsay was correct.

A frequent aspect of the conduct-as-hearsay problem is presented by evidence of a person's silence in the face of statements of accusation or regarding matters in controversy. In Mississippi, silence is treated as hearsay, but may be admissible in civil[55] and criminal[56] cases under the exception for admissions. The federal rules embody a different approach, classifying silence as nonhearsay unless the silence is intended to be an assertion. Silence classified as nonhearsay is admissible if relevant, while assertive silence may be admissible under rule 801(d)(2)(B).[57]

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[51] *See, e.g.*, Key Life Ins. Co. v. Byrd, 312 So. 2d 450, 452 (Miss. 1975) (wife's testimony that her husband said, "Oh, I hit a tree," was hearsay); State Farm Mut. Auto. Ins. Co. v. Stewart, 288 So. 2d 723, 724-25 (Miss. 1974) (testimony by owner of automobile that driver of other vehicle told him he was insured was hearsay).

[52] *See, e.g.*, Pevey v. Alexander Pool Co., 244 Miss. 25, 30, 139 So. 2d 847, 849 (1962) (written advertisement of a manufacturer concerning safety valve is hearsay evidence as the unsworn statement of an unknown person); American Hosp. & Life Ins. Co. v. Runnels, 240 Miss. 685, 688, 128 So. 2d 383, 384 (1961) (monthly premium notices on which deceased insured had purportedly written date of premium payment was ruled hearsay).

[53] *See* Odum v. Luehr, 213 Miss. 782, 787, 57 So. 2d 867, 869-70 (1952) (testimony about number of trees cut held admissible despite hearsay objection).

[54] *Id.*

[55] *See, e.g.*, State v. Farish, 23 Miss. 483, 493-94 (1852) (admitting statements made by one party to the agent of the other, which were not disputed or denied by the agent); *cf.* Edwards v. Williams, 3 Miss. (2 Howard) 846, 849 (1838) (statement made in presence of a party, without contradiction by him, not an admission unless the truth of the statement was within the knowledge of that party).

[56] *See, e.g.*, Jolly v. State, 269 So. 2d 650, 656 (Miss. 1972) (statements made by a third person, which tend to incriminate an accused, are admissible if made in accused's presence and not contradicted or denied by him); Thurmond v. State, 212 Miss. 36, 42, 53 So. 2d 44, 45-46 (1951) (accusatory statements made in defendant's presence and not denied are admissible as a confession implied from silence). Evidence of silence is not

Despite its failure to define "statement" and "declarant," the Mississippi Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Stewart*[58] recently quoted with approval two definitions of hearsay:

> Two well known definitions of "hearsay" should be noted. One is that "by 'hearsay' is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness has received his information."
>
> The other asserts that the hearsay rule "is that rule which prohibits the use of a person's assertion, as equivalent to testimony of the fact asserted, unless the asserter is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it."[59]

Although it states a reason for the hearsay rule, the first definition is inadequate because it fails to say that the evidence must be assertive in nature and offered to prove the truth of the facts asserted. Similarly,

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admissible to prove the truth of the accusatory statements, but to show circumstantially another person's admission by his failure to respond. Character v. State, 212 Miss. 30, 33, 53 So. 2d 41, 42 (1951).

The rule with regard to admission by silence is discussed in Anderson v. State, 171 Miss. 41, 156 So. 645 (1934), in which the Mississippi Supreme Court stated:

> If a party out of court accuses another of crime or makes statements against him, in the hearing of a third party, and the accused remains silent, or does not deny the accusation or statement affecting vitally his interest under certain conditions, the hearsay evidence of the third party as to the statement out of court is competent. But it is permitted to go into the record as evidence only upon the presumption that the silence or failure to deny, on the part of the accused, is an admission.

Id. at 47, 156 So. at 646. In criminal cases the court also has required the state to show affirmatively that the statement charges the accused with a crime and that the defendant stood mute or failed to deny it. Robinson v. State, 235 Miss. 100, 109, 108 So. 2d 583, 587 (1959). Furthermore, "a trial judge should be cautious in allowing into evidence 'admissions by silence.'" Bitner v. State, 293 So. 2d 339, 343 (Miss. 1974). Finally, it should be noted that the United States Supreme Court has effectively condemned the use of admissions by silence when the accused is in police custody. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

[57] FED. R. EVID. 801(d)(2)(B). See notes 110 through 113 and accompanying text *infra*.

[58] 288 So. 2d 723 (Miss. 1974).

[59] *Id.* at 724-25 (citing 2 JONES, ON EVIDENCE § 8:1, at 159 (6th ed. 1972)).

the second definition is more a description of the hearsay rule's operation than a definition of hearsay.

Mississippi has expressly recognized that an extrajudicial statement is not hearsay unless introduced to prove the truth of the matter asserted, but only a few Mississippi cases discuss this important and basic principle.[60] In *Handshoe v. Daly*,[61] claimants brought an action against the owner of a house and others to enforce a statutory lien for labor and materials furnished for construction of the house. Several claimants testified about statements made to them by the contractor when he ordered the materials. The Mississippi Supreme Court found no error in the lower court's admission of this testimony and pointed out that

> the truth or falsity of [the] statement was not a fact in issue, and hence the hearsay rule does not apply. Where the fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible in evidence as an independently relevant fact.[62]

The presence or absence of the party against whom an out-of-court statement is offered has been a dubious factor occasionally referred to by Mississippi courts[63] and commentators[64] in consideration of hearsay issues. There are a few cases in which the presence of the adverse party in a civil case[65] or the defendant in a criminal case is deemed necessary,[66] but it is implicit in such cases that a party's presence is relevant only to the issue of notice, acquiescence, or admission by silence. No Mississippi case has ever established absence of the adverse party as an element of hearsay. Nonetheless, since this mythical requirement may continue to confuse some members of the legal community, the Mississippi Supreme Court should clarify the subject in future decisions.

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[60] *See, e.g.*, Harley v. State, 345 So. 2d 1048, 1050 (Miss. 1977) (threats made to defendant's wife and stepson admissible to show state of mind of defendant at time of shooting); Lee v. State, 338 So. 2d 395, 397 (Miss. 1976) ("To constitute hearsay, extrajudicial words must by some means present a statement, declaration, or assertion introduced for the purpose of providing the truth of the matter contained in or asserted by the item or thing."); Handshoe v. Daley, 211 Miss. 189, 193, 51 So. 2d 230, 232 (1951) (where the existence of a statement is an independently relevant matter, regardless of its truth, the statement is admissible).

[61] 211 Miss. 189, 51 So. 2d 230 (1951).

[62] *Id.* at 193, 51 So. 2d at 232.

[63] *See, e.g.*, Walker v. State, 135 Miss. 422, 427, 100 So. 9, 9-10 (1924) (out-of-court statements of a third person, made outside presence of defendants, were pure hearsay).

[64] *See* Mason & Hengen, *supra* note 47.

[65] *See, e.g.*, Hall v. Clopton, 56 Miss. 555, 559 (1879) (plaintiff's evidence of conversations between herself and her husband excluded because of defendant's absence); Presley v. Quarles, 31 Miss. 151, 154 (1856) (plaintiff's out-of-court declarations not admissible since made outside presence of defendant).

[66] *See, e.g.*, Sims v. State, 313 So. 2d 388, 391 (Miss. 1975) (witness' statement incriminating defendant, made outside defendant's presence, not an admission by silence); Walker v. State, 135 Miss. 422, 427, 100 So. 9, 10 (1924) (testimony about statements of defendant's sister concerning defendant's guilt inadmissible since defendant not present when statements were made).

To exclude hearsay evidence, a timely objection must be made. Mississippi recognizes that hearsay admitted without objection may have sufficient probative value to establish a fact in controversy and may be properly considered by the trier of fact.[67]

Rule 801(d). Statements Which are Not Hearsay

Subdivision (d) of rule 801 excludes from the hearsay definition two categories of statements which otherwise would fall within its scope: certain prior statements by a witness and admissions by a party-opponent. These categories are not exceptions to the hearsay rule; they are nonhearsay.

Rule 801(d)(1). Prior Statement by Witness[68]

Prior statements of a witness have traditionally been classified as hearsay if offered to prove the truth of the matter asserted, thus permitting their use only for impeachment purposes. As substantive evidence a prior statement was admissible only when it fell within an exception to the hearsay rule.[69] This approach was justified on the grounds that the witness-declarant was not under oath, was not in the presence of the trier of fact, and was not subject to cross-examination at the time of his prior statement.[70] The modern view, supported by most commentators[71] and some state[72] and federal[73] courts, is that the prior statement regains most of its lost protections when the declarant appears in court, where he is subject to cross-examination about his prior statement. Furthermore, "[t]he prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play."[74]

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[67] *See, e.g.*, Citizens Bank v. Miller, 194 Miss. 557, 565-67, 11 So. 2d 457, 459 (1943) (husband's testimony that wife did not receive check properly considered since the statement was admitted without objection).

[68] FED. R. EVID. 801(d)(1) provides:

> [A statement is not hearsay if] [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .

[69] C. MCCORMICK, *supra* note 4, § 251, at 601.

[70] *See* California v. Green, 399 U.S. 149, 154 (1970).

[71] *E.g.*, C. MCCORMICK, *supra* note 4, § 251, at 601-04; 3A J. WIGMORE, *supra* note 4, § 1018, at 995-1007; Maguire, *supra* note 26, at 767-68; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192-96 (1948).

[72] This view was explained by the Kentucky court in Jett v. Commonwealth, 436 S.W.2d 788, 792 (Ky. 1969), when it stated:

Under the federal rules, a prior statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the subject, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury . . ., or (B) consistent with his testimony and is offered to

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> When both the person who is said to have made the out-of-court statement and the person who says he made it appear as witnesses under oath and subject to cross-examination there is simply no justification for not permitting the jury to hear, as substantive evidence, all they both have to say on the subject and to determine wherein lies the truth.

Accord, Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609, 614 (1969) (a witness' prior inconsistent statements, but not his prior consistent statements, are admissible as substantive evidence), *cert. denied,* 399 U.S. 929 (1970). Also, New Jersey, California, Utah, Nevada, New Mexico, and Wisconsin have adopted rules based on the modern view of prior statements by a witness. S. Rep. No. 1277, 93d Cong., 2d Sess. 16, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051, 7062.

[73] *See, e.g.,* United States v. De Sisto, 329 F.2d 929, 932-34 (2d Cir.) (use of extrajudicial statements of identification by a witness as substantive evidence), *cert. denied,* 377 U.S. 979 (1964); Di Carlo v. United States, 6 F.2d 364, 367-68 (2d Cir.) (prior inconsistent statements of witness may be considered by jury for truth), *cert. denied,* 268 U.S. 706 (1925). Judge Friendly, in United States v. De Sisto, discussed the traditional approach to admissibility of prior statements by a witness:

> The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as "pious fraud," "artificial," "basically misguided," "mere verbal ritual," and an anachronism "that still impede(s) our pursuit of the truth." . . . The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that "The fresher the memory, the fuller and more accurate it is. . . . Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy . . . [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences."

329 F.2d at 933 (citations omitted).

[74] S. Rep. No. 1277, 93d Cong., 2d Sess. 16, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051, 7062.

> rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him.[75]

As originally submitted by the Supreme Court,[76] the controversial subpart (d)(1)(A) of rule 801 would have allowed all prior inconsistent statements to be admissible as substantive evidence to prove the truth of the matter asserted in the statement.[77] Congress, however, limited the rule to statements made under oath subject to penalty of perjury.[78] This limitation is unsupported by logic, because at the later trial the declarant is present as a witness, under oath, and subject to cross-examination about his prior statement.[79] The practical effect of rule 801(d)(1)(A) is to permit substantive use of grand jury testimony in criminal cases[80] and to expand the prior recorded testimony exception in civil cases.[81] Of course, any prior inconsistent statement may still be used in its traditional role to impeach the credibility of a witness.

In the past, prior consistent statements of a witness have been admissible only to rebut a charge of recent fabrication; they have not been used substantively to prove the truth of the matter asserted.[82] Rule 801(d)(1)(B) now permits substantive use of such statements when they are initially offered to rebut a charge of fabrication or improper influence or motive.[83] The practical effect of this change may be illusory, however, since juries have probably been unable to follow an instruction limiting the purpose for which the statement was admitted. There is no requirement that the prior statement be under oath; any prior statement consistent with the witness' testimony will qualify once the opposing party makes an express or implied charge of fabrication.[84]

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[75] FED. R. EVID. 801(d)(1).

[76] Order, 56 F.R.D. 183 (1972).

[77] *Id.* at 293. A small but growing number of states have adopted the approach proposed by the Supreme Court in its original draft of the Federal Rules of Evidence. Moreover, the Supreme Court has held that such a rule does not violate the sixth amendment right of witness confrontation. California v. Green, 399 U.S. 149, 168 (1970).

[78] *See* 11 MOORE'S FEDERAL PRACTICE § 801.01[01], at VIII-18 (1976); *id.* § 801.01[4.—3], at VIII-22. The House of Representatives also wanted a requirement that the prior statement must have been subject to cross-examination when made. *Id.* § 801.01 [4.—2], at VIII-21. Such a requirement, however, would have unnecessarily prevented substantive use of grand jury testimony of a recalcitrant witness in a criminal case. *See* United States v. Palacios, 556 F.2d 1359, 1362-63 (5th Cir. 1977) (prior inconsistent statements not under oath held to be hearsay and not changed by the Federal Rules of Evidence). For a recent decision liberally interpreting the term "other proceeding" in rule 801(d)(1)(A), see United States v. Castro-Ayon, 537 F.2d 1055, 1058 (9th Cir. 1976) (nonjudicial immigration interrogation under oath held admissible).

[79] 11 MOORE'S FEDERAL PRACTICE § 801.41[2], at VIII-36 (1976). *See* Stalmack, *Prior Inconsistent Statements: Congress a Compromising Step Backward in Enacting Rule 801(d)(1)(A),* 8 LOY. CHI. L.J. 251 (1977). It should be noted that there is an essential difference between admissibility and sufficiency of evidence; admissibility should never be predicated upon the evidence's ability to sustain a case. *Id.* at 267.

[80] *See, e.g.,* United States v. Champion Int'l Corp., 557 F.2d 1270, 1274 (9th Cir.) (portions of inconsistent testimony of witness before grand jury were admissible even though some of grand jury testimony elicited by leading questions), *cert. denied,* 98 S. Ct. 428 (1977).

[81] See notes 700 through 725 and accompanying text *infra.*

[82] C. MCCORMICK, *supra* note 4, § 251, at 604.

Rule 801(d)(1)(C) permits the use of an out-of-court identification of a person made after perceiving him.[85] Congress initially deleted subpart (C) because of concern that a conviction could be based on unsworn, out-of-court testimony, but after subsequent consideration, subpart (C) was left intact.[86] Although there is a split among states concerning admissibility of an out-of-court identification, the trend is to allow admission when the identifier is available for cross-examination.[87] Such a rule is also justified because identifications relatively contemporaneous with the events are more reliable than courtroom identifications and because constitutional safeguards now apply to certain out-of-court identifications.[88]

In Mississippi any out-of-court statement inconsistent with a witness' testimony is admissible for impeachment and may be considered by the trier of fact as affecting the weight and credibility of the witness' testimony.[89] After a predicate is properly laid,[90] the statement may be proved by testimony of the declarant or other witnesses.[91] Despite a requirement that the prior inconsistent statement be material and relevant to an issue in the case,[92] the statement is not admissible to prove the truth of the facts asserted in the statement.[93] Moreover, it apparently makes no difference that the statement was made under oath at a former trial or hearing.[94] Mississippi should review its position on the use of prior inconsistent statements and consider allowing their substantive use when the witness is before the trier of fact, under oath, and subject to cross-examination about his statement.

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[83] FED. R. EVID. 801(d)(1)(B).

[84] *Id.*, Advisory Comm. Note.

[85] FED. R. EVID. 801(d)(1)(C). *See also* Anderson v. Maggio, 555 F.2d 447, 450 (5th Cir. 1977).

[86] 11 MOORE'S FEDERAL PRACTICE § 801.41[4.—1], at VIII-37 (1976).

[87] Gilbert v. California, 388 U.S. 263, 272 n.3 (1967). *See generally* Annot., 71 A.L.R.2d 449 (1960).

[88] C. MCCORMICK, *supra* note 4, § 251, at 603; 11 MOORE'S FEDERAL PRACTICE § 801.41[4.—2], at VIII-39 (1976). *See generally* Manson v. Brathwaite, 97 S. Ct. 2243 (1977); Kirby v. Illinois, 406 U.S. 682 (1972); Foster v. California, 394 U.S. 440 (1969); Gilbert v. California, 388 U.S. 218 (1967).

[89] Capital Constr. Co. v. Tullier, 210 So. 2d 654, 656 (Miss. 1968); *accord,* Vinson v. Glenn, 338 So. 2d 385, 386-87 (Miss. 1976) (declaration filed by witness in another action admitted to impeach his testimony in present action). After a proper foundation is laid, a party may impeach his own witness when surprised by the witness' testimony and the witness is hostile. Hooks v. State, 197 So. 2d 238, 239-40 (Miss. 1967); *accord,* Clark v. Lansford, 191 So. 2d 123, 125-26 (Miss. 1966); Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964).

[90] The Mississippi court delineated the procedure for laying a predicate in Carlisle v. State, 348 So. 2d 765, 766 (Miss. 1977), explaining that "in laying the predicate to introduce prior inconsistent statements of a witness, the questions should include whether or not on a specific date, at a specific place, and in the presence of specific persons, the witness made a particular statement."

[91] Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964).

In *Stampley v. State*,[95] the Mississippi Supreme Court recently acknowledged that a prior consistent statement, also known as bolstering testimony, is a form of hearsay, stating:

> Evidence of prior consistent statements made by the witness is not evidence of the fact testified to by the witness, but may be offered for the sole purpose of supporting the testimony of the witness whose veracity has been attacked. Evidence of prior consistent statements should be received by the court with great caution and only for the purpose of rebuttal so as to enable the jury to make a correct appraisal of the credibility of the witness.[96]

While the present Mississippi rule unnecessarily prohibits substantive use of a prior consistent statement, the distinction may be immaterial to a jury once the statement is admitted. Nonetheless, if the opposing party attacks a witness' testimony as inconsistent with prior statements, a recent fabrication, or improperly influenced or motivated, evidence of the witness' prior consistent statements should be admissible for the truth of the matter asserted and not merely to bolster his credibility.

Until recently, Mississippi firmly condemned the admissibility of extrajudicial identifications, regardless of whether the courtroom testimony about the prior identification was offered by the identifier or some other person.[97] The court reconsidered this restriction in a recent case, however, and held that a principal witness to a crime may testify to his out-of-court identification.[98]

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[92] Price v. Simpson, 205 So. 2d 642, 643 (Miss. 1968); Witt v. State, 159 Miss. 478, 483, 132 So. 338, 339 (1931); Williams v. State, 73 Miss. 820, 824, 19 So. 826, 827, *aff'd*, 120 U.S. 213 (1896). *See also* Carlisle v. State, 348 So. 2d 765 (Miss. 1977); Kelly v. State, 278 So. 2d 400 (Miss. 1973).

[93] *E.g.*, Magee v. Magee, 320 So. 2d 779, 783 (Miss. 1975); Sims v. State, 313 So. 2d 388, 391 (Miss. 1975); Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964).

[94] *See, e.g.*, Clark v. Lansford, 191 So. 2d 123, 126 (Miss. 1966) (witness may be impeached when testimony differs from that on former hearing); Shaw v. State, 136 Miss. 1, 4, 100 So. 519, 519 (1924) (contradictory testimony of defendant in prior committing court of justice of peace used to impeach); Clark v. State, 108 Miss. 484, 485, 66 So. 976, 976 (1915) (prior grand jury testimony contradictory to trial testimony should have been allowed as affecting credibility of witness); Magee v. State, 21 So. 130, 131 (Miss. 1897) (evidence that witness at former trial testified differently under oath was properly used for impeachment).

[95] 284 So. 2d 305 (Miss. 1973).

[96] *Id.* at 307.

Rule 801(d)(2). Admissions by Party-Opponent[99]

Historically, admissions by a party have been admissible as substantive evidence of the facts admitted under an exception to the hearsay rule.[100] Although various theories support the admissibility of admissions,[101] the most satisfactory justification is simply that the adversary system calls for generous admissibility of such evidence.[102] Accordingly, admissions do not require the assurances of trustworthiness that are normally required for hearsay exceptions. There is no requirement that the admission be against the party's interest when made;[103] therefore, admissions should not be confused with declarations against interest.[104] Additionally, no foundation is required for use of a party's admission.[105] Unlike judicial admissions, such as pleadings and stipulations, evidential admissions are not conclusive on the party making them.[106]

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[97] *See, e.g.,* Simes v. State, 250 So. 2d 705, 707 (Miss. 1971) ("dangerous practice for prosecuting attorneys to offer in evidence testimony concerning extrajudicial identifications"); Butler v. State, 217 So. 2d 3, 6 (Miss. 1968) (state should not offer in evidence testimony concerning an extrajudicial identification); Moore v. State, 102 Miss. 148, 156, 59 So. 3, 4 (1912) (reversible error to allow witness to testify about prior out-of-court identification made to her sister). *But see* Pickett v. State, 164 Miss. 142, 152, 144 So. 552, 553 (1932) (witness' testimony of out-of-court identification of defendant, by recognition and sound of voice, held properly admitted).

[98] Fells v. State, 345 So. 2d 618, 622 (Miss. 1977). According to the majority in this six-to-three decision, the out-of-court identification may occur in a police lineup, a personal confrontation, or otherwise. The majority further held that if the principal witness' identification is impeached, then third persons present at the identification may also testify. *Id.*

[99] Fed. R. Evid. 801(d)(2) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if—
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> . . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

See Criminal Law 🔑 405-15; Evidence 🔑 200-65.

[100] C. McCormick, *supra* note 4, § 262, at 629. *See also* E. Morgan, Basic Problems of Evidence 262 (1962); 4 J. Wigmore, *supra* note 4, §§ 1048-1087; Strahorn, *A Reconsideration of the Hearsay Rule and Admissions,* 85 U. Pa. L. Rev. 484 (1937).

[101] For discussions of several of these theories, see the authorities cited in note 100 *supra.*

[102] Fed. R. Evid. 801(d)(2), Advisory Comm. Note; C. McCormick, *supra* note 4, § 262, at 630. A party against whom an admission is offered can hardly complain that he was not under oath when he made the statement or that he had no opportunity to cross-examine himself at that time. He can always take the stand and explain his admission.

[103] Fed. R. Evid. 801(d)(2), Advisory Comm. Note; C. McCormick, *supra* note 4, § 262, at 629.

Under the federal rules, certain admissions are classified as nonhearsay statements and are admissible on that basis rather than as a hearsay exception. Rule 801(d)(2) provides that an admission is not hearsay if

> [t]he statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The drafters of the federal rules decided that the responsibility of the party under such circumstances was sufficient to justify the five categories of statements as admissions.[107]

"A party's own statement is the classic example of an admission,"[108] and under the broad language of subpart (A) of rule 801(d)(2), the statement may be offered against the party in a representative capacity, without regard to whether he was actually acting as a representative at the time he made the statement, so long as the statement is relevant to representative affairs.[109]

Subpart (B) of rule 801(d)(2) embodies the well-established principle that an admission may arise when a party adopts or acquiesces in the truthfulness of another person's statement.[110] There is no requirement that the party have personal knowledge of the facts of the statement,[111] and his adoption or acquiescence in the truth of the statement may be manifested in any appropriate manner.[112] Silence, under circumstances where a person would ordinarily object to or deny an untrue statement, may constitute an admission; nonetheless, courts should receive evidence of admissions by silence with caution, particularly in criminal cases.[113]

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[104] A declaration against interest must have been against the declarant's interest when made and is usually made by an unavailable person who is not a party. An admission, of course, can be made only by a party, and there is no requirement that it be against his interest when made. Despite frequent judicial language to the contrary, there is no exception or concept known as an "admission against interest." *See generally* Cox v. Esso Shipping Co., 247 F.2d 629, 632-33 (5th Cir. 1957).

[105] United States v. Robinson, 530 F.2d 1076, 1083 n.13 (D.C. Cir. 1976). *See generally* 4 J. WIGMORE, *supra* note 4, at § 1051.

[106] *E.g.,* United States v. Belculfine, 527 F.2d 941, 944 (1st Cir. 1975).

[107] FED. R. EVID. 801(d)(2), Advisory Comm. Note. Not included in these categories are statements by a party's predecessor in title or interest. Under the present rules, these statements will be inadmissible unless outside the scope of the hearsay rule or within some exception. *See generally* P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 108 (1973).

[108] FED. R. EVID. 801(d)(2)(A), Advisory Comm. Note.

[109] *Id.*

"When a party to the suit has expressly authorized another person to speak on his behalf, it is an obvious and accepted extension of the admission rule, to admit against the party the statement of such person."[114] Subpart (C) phrases this principle broadly, encompassing statements made by the party's agent to any person, even to the principal himself. Consequently, as the Advisory Committee observed, a party's books or records may be introduced against him, even though he had no intention of disclosing them to third persons.[115]

Subpart (D) applies to those instances where an agent or employee has no express authority from the principal to speak. In these circumstances, a statement by the agent is an admission of the principal if the statement concerns a matter within the scope of his agency or employment and was made during the agency relationship.[116] In the past, some courts have followed the traditional test of agency to determine admissibility, requiring that the agent's scope of authority include the specific authority to make statements on behalf of his principal.[117] Following the approach adopted in rule 801(d)(2), other courts have required only that the agent's statement concern a matter within the scope of his authority.[118] For example, a truck driver's authority will not ordinarily carry with it authority to make a statement to a bystander about a vehicular accident; thus, under the traditional test, such a statement is inadmissible. Rule 801(d)(2)(D), however, would permit use of the driver's statement as an admission of his employer since it concerns his driving, which is the subject of his employment or agency. If an agency relationship is in dispute, it should be noted that out-of-court statements of the agent are not admissible to prove the existence or extent of his agency.[119]

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[110] *See, e.g.*, Pekelis v. Transcontinental & W. Air, Inc., 187 F.2d 122, 128 (2d Cir. 1951) (principal may expressly or impliedly vouch for agent's statement to make it admissible as adoptive admission).

[111] Fed. R. Evid. 801(d)(2)(B), Advisory Comm. Note.

[112] *Id. See generally* C. McCormick, *supra* note 4, §§ 269-275.

[113] An admission by silence in a criminal case may involve constitutional considerations relating to custodial interrogation and the right to counsel. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1964) (evidence that defendant remained silent in face of police accusation is violative of defendant's fifth amendment rights).

[114] C. McCormick, *supra* note 4, § 267, at 639.

[115] Fed. R. Evid. 801(d)(2)(C), Advisory Comm. Note. Typical examples are an employee's accident report to his employer and a medical examiner's report to an insurance company regarding an applicant's health. *Id.*

[116] *Id.* 801(d)(2)(D), Advisory Comm. Note.

[117] *See, e.g.,* Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81, 85 (2d Cir. 1965) (applying Restatement (Second) of Agency § 286 (1957) and holding statements inadmissible under that test); Dilley v. Chesapeake & O. Ry., 327 F.2d 249, 251-52 (6th Cir. 1964) (railroad employee's accident report to railroad was not admission of railroad).

[118] *See, e.g.*, Joseph T. Ryerson & Son, Inc. v. H.A. Crane & Brother, Inc., 417 F.2d

The last category of admissions, embodied in subpart (E) of rule 801(d)(2), follows the accepted pattern[120] of admitting statements made by a coconspirator of a party during the course and in furtherance of the conspiracy. Although problems may arise in determining when a conspiracy ends, the United States Supreme Court has provided some guidelines in this area by denying admissibility to statements made after the objectives of the conspiracy have failed or been achieved.[121] This category may be applicable to other concerted actions. For example, the Senate Judiciary Committee understood that subpart (E) was "meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged."[122]

Mississippi follows the traditional approach of classifying admissions as hearsay exceptions rather than as nonhearsay. Once admitted into evidence, admissions constitute substantive proof of the truth of the facts asserted.[123] Despite a few cases that confusingly refer to an "admission against interest,"[124] there is no requirement that the admission be against the party's interest at the time it was made. It need only be inconsistent with the party's present claim or contentions in court.[125]

1263, 1269-70 (3d Cir. 1969) (statement of unidentified employee about origin of fire held admissible against employer); Royal Dutch Airlines Holland v. Tuller, 292 F.2d 775, 782-85 (D.C. Cir. 1961) (statement relating to his duties, made by airplane's radio operator to inspector, was properly admitted).

[119] Holland v. Cooper, 192 F.2d 214, 216 (5th Cir. 1951); *see* Gallo v. Crocker, 321 F.2d 876, 877 (5th Cir. 1963) (statement of defendant was not admissible to prove his agency with codefendant).

[120] Fed. R. Evid. 801(d)(2)(E), Advisory Comm. Note.

[121] *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 490 (1963) (a coconspirator's hearsay statement may not be admitted against accused for any purpose unless made during and in furtherance of conspiracy).

[122] S. Rep. No. 1277, 93d Cong., 2d Sess. 26-27 (1974), *reprinted in* [1975] U.S. Code Cong. & Ad. News 7051, 7073.

[123] Bolden v. Gatewood, 250 Miss. 93, 117-18, 164 So. 2d 721, 731-32 (1964); *accord*, Reynolds v. McGehee, 220 Miss. 750, 753, 71 So. 2d 780, 782 (1954) (admission alone may be sufficient to establish the fact admitted); McCloskey Bros. v. Hood Milling Co., 119 Miss. 92, 98-99, 80 So. 492, 493 (1919) (same).

[124] *E.g.*, Bolden v. Gatewood, 250 Miss. 93, 117-18, 164 So. 2d 721, 731-32 (1964); Reynolds v. McGehee, 220 Miss. 750, 753, 71 So. 2d 780, 782 (1954).

[125] *See* Hickey v. Anderson, 210 Miss. 455, 463, 49 So. 2d 713, 717 (1951) (while not

While an admission may dispense with the necessity for other proof of the facts admitted, a party is not bound by his out-of-court admission and may offer proof contrary to his admission.[126]

A witness may testify about the facts or details of an admission that he has heard, but the witness cannot merely give his conclusion or opinion about the admission.[127] This rule, however, should not be confused with admissibility of a party-opponent's admission that is in the form of an opinion. While it is not altogether clear, in Mississippi it appears that the opinion rule does not limit the use of a party's admissions.[128] This is certainly the more logical approach.

While a party's own statement is clearly admissible against him in Mississippi,[129] questions of admissibility are more complex when the statement involved was not made by the party, but was one in which he may have aquiesced or adopted. The question most frequently arises when the party fails to deny or reply to a statement made in his presence under conditions that normally would evoke a reaction, that is, an admission by silence. Mississippi requires proof showing affirmatively that the party did not deny the statement,[130] but it is not necessary to prove

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against her interest at the time, defendant's extrajudicial statement that grantor of contested deed was a "little bit off" was inconsistent with her present contention).

[126] *E.g.*, Bolden v. Gatewood, 250 Miss. 93, 117-18, 164 So. 2d 721, 731-32 (1964); Bradshaw v. Stieffel, 230 Miss. 361, 367, 92 So. 2d 565, 567 (1957).

[127] Coney v. Coney, 249 Miss. 561, 571, 163 So. 2d 692, 696-97 (1964).

[128] *See* Mason v. Shook, 240 Miss. 478, 487, 127 So. 2d 658, 662 (1961) (statement by driver after accident that it was all his fault held admissible); Hickey v. Anderson, 210 Miss. 455, 463, 49 So. 2d 713, 717 (1951) (party's extrajudicial opinion statement about mental capacity of grantor of contested deed held admissible). *But see* Coney v. Coney, 249 Miss. 561, 573, 163 So. 2d 692, 697 (1964) ("A statement of declarant's opinion or conclusion respecting a matter in issue is generally held inadmissible as an admission."). Although certain language in the *Mason* and *Hickey* cases appears to conflict with the *Coney* case, the results are not inconsistent. *Coney* involved the witness' opinion about the party's admission rather than the party's opinion as expressed in his admission. Nonetheless, there is a split of authority in other jurisdictions on the admissibility of a party's admission which expresses an opinion. 31A C.J.S. *Evidence* § 272(b), at 700-01 (1964). The better approach favors admissibility of admissions in opinion form because, among other reasons, the opinion will necessarily demonstrate the party's perception of the facts and application of them in forming his opinion. *See* C. McCormick, *supra* note 4, § 264, at 632-33.

[129] *See* Bolden v. Gatewood, 250 Miss. 93, 117-18, 164 So. 2d 721, 731-32 (1964) (any statement made by or attributable to a party constitutes an admission); Vines v. Perry, 208 Miss. 869, 871, 45 So. 2d 734, 735 (1950) (statement by defendant that he shot plaintiff's cattle was plainly an admission on that issue). A plea of guilty in a criminal case is admissible in a subsequent civil case as an admission, but, as with all admissions, the guilty plea is not conclusive and may be explained. *See* Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (guilty plea to charge of unlawfully passing school bus was admissible in civil suit for personal injuries); Kelly v. King, 196 So. 2d 525, 527 (Miss. 1967) (guilty plea to charge of murder was admissible in wrongful death action).

[130] *See, e.g.*, Henry v. Toney, 217 Miss. 716, 726-27, 64 So. 2d 904, 907 (1953) (testi-

that the party actually heard the statement. That fact, together with the statement's effect on the party, is a matter for the jury to determine.[131] Although the admissibility requirements for admissions by silence are similar in both civil and criminal cases, in criminal cases the state must show affirmatively that the statement charged the accused with a crime.[132] Additionally, constitutional considerations are applicable to an accused's silence in custodial situations in criminal cases.[133]

No Mississippi case was found discussing the admissibility of a statement made by a person expressly authorized to speak on a party's behalf. But since this principle is merely an extension of the admission rule,[134] Mississippi courts should follow it. Normally, authorized statements are made to third persons; whether Mississippi will extend this principle to include an agent's statements made to the party himself is a question for future determination.

In the absence of express authority, Mississippi permits the introduction of admissions by an employee or agent of the party if the admission concerns a matter within the employee's or agent's scope of authority.[135] In accord with the Federal Rules of Evidence,[136] there appears to be no restrictive requirement that the scope of authority must include specific authority to speak. The conduct of an agent may also be admissible against a principal as an admission.[137] Earlier Mississippi cases,

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mony not qualified as an admission since witness did not say whether party denied statements but not reversible error since party admitted he had made no denial); Anderson v. State, 171 Miss. 41, 47, 156 So. 645, 646-47 (1943) (burden is on state to show that accusation against defendants stood undenied by them).

[131] Thurmond v. State, 212 Miss. 36, 42-43, 53 So. 2d 44, 46 (1951); *accord,* Character v. State, 212 Miss. 30, 33, 53 So. 2d 41, 42 (1951).

[132] Robinson v. State, 235 Miss. 100, 109, 108 So. 2d 583, 587 (1959).

[133] *See* Miranda v. Arizona, 384 U.S. 436 (1964) (confessions made while in custody are inadmissible unless procedural safeguards provided); Bitner v. State, 293 So. 2d 339, 341 (Miss. 1974) (error to admit testimony under "admissions of silence" doctrine because defendant had a right under *Miranda* to remain silent). *But cf.* Jolly v. State, 269 So. 2d 650, 655-56 (Miss. 1972) (admissions of codefendants to officers admissible since appellant had not denied the statements and had made similar statements after waiving his *Miranda* rights).

[134] C. McCormick, *supra* note 4, § 267, at 639.

[135] *See, e.g.,* Bullock v. Sam Ramsey, Jr. Trucking Co., 207 So. 2d 628, 631 (Miss. 1968) (admission by truck driver to policeman that his brakes had not been working properly); Milner Hotels v. Brent, 207 Miss. 892, 901-02, 43 So. 2d 654, 656-57 (1950) (apology by hotel manager admission against hotel in action for wrongful ejection from room); Western Union Tel. Co. v. Walters, 106 Miss. 59, 60-61, 63 So. 194, 195 (1913) (admissions by delivery boy regarding his delay admissible in action against company for failure to deliver promptly).

[136] See notes 116 through 119 and accompanying text *supra.*

[137] *See* Interstate Co. v. Garnett, 154 Miss. 325, 355-56, 122 So. 373, 381 (1929) (acts of employee to procure a witness to perjure himself were admissible in the nature of admissions).

hopefully now obsolete, frequently required that an agent's statements be close in time to the act or occurrence: the res gestae test.[138]

Mississippi ordinarily follows traditional approaches in dealing with admissions arising from other relationships. For example, once a conspiracy is established, the declarations of a coconspirator engaged in fraudulent or criminal activity are admissible against the others,[139] unless the object of the conspiracy has ended.[140] Similarly, the admission of one partner is an admission of all the partners.[141] This may apply even after dissolution of the partnership, if the admission relates to facts occurring in the regular course of business prior to the dissolution.[142] Privity or identity of interest frequently justifies the use of a declaration made by a grantor of real property,[143] seller of personal property,[144] assignor,[145] or donor[146] against a successor party, provided that the declaration relates to the declarant's property and was made while he owned the property.[147] Because of the lack of privity, an admission by a codistributee is not evidence against another.[148] Furthermore, admissions by tenants in common are not admissible unless made by all of them.[149]

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[138] *See, e.g.*, Vicksburg & M.R.R. v. McGowan, 62 Miss. 682, 698 (1885) (in action against railroad, engineer's statement, "How the hell could a drunken man see a drunken man," held inadmissible because it was "sometime after the occurrence"); Moore v. Chicago, St. L. & N.O.R.R., 59 Miss. 243, 250 (1881) (admissions by a conductor, made some days after the occurrence, that he kicked plaintiff from the train, ruled inadmissible since the admissions were not part of the res gestae).

[139] Stovall v. Farmers' & Merchants' Bank, 16 Miss. (8 S. & M.) 305, 315 (1847); *accord*, Trimble v. Turner, 21 Miss. (13 S. & M.) 348, 362-63 (1850). *But cf.* Osborne v. State, 99 Miss. 410, 421-22, 55 So. 52, 53 (1911) (testimony of accomplice should be received and weighed with great distrust by the jury).

[140] Cofer v. State, 158 Miss. 493, 498, 130 So. 511, 512 (1930).

[141] Lea v. Guice, 21 Miss. (13 S. & M.) 656, 668-69 (1850).

[142] Curry, Dismukes & Co. v. Kurtz, 33 Miss. 24, 32 (1857). *But see* Thomas v. Bowman, 73 U.S. 316, 318 (1867) (declarations of partner after dissolution of partnership held not admissible against former partners).

[143] *See, e.g.*, Farmers' Bank v. Douglass, 19 Miss. (11 S. & M.) 469, 544 (1848) (declarations of vendor, made before he divested himself of his interest, ruled admissible against vendee). The *Douglass* court held, however, that the vendee must have knowledge of the declarations. *Id.* Such a requirement seems unnecessary.

[144] *See, e.g.*, Walker v. Marseilles, 70 Miss. 283, 287, 12 So. 211, 211 (1892) (declarations against title by transferor, made prior to transfer, ruled admissible against one taking under him).

[145] *See, e.g.*, Brown v. McGraw, 20 Miss. (12 S. & M.) 267, 268 (1849) (declarations made before assignment by assignor of note ruled admissible against his assignee and all claiming under him).

[146] *See, e.g.*, McClellan v. McCauley, 158 Miss. 456, 471-72, 130 So. 145, 149 (1930) (prior or contemporaneous declarations of the alleged donor ruled admissible to show that a certain transaction was not intended as a gift).

[147] *See* cases cited in notes 144 through 146 *supra*.

[148] Prewett v. Coopwood, 30 Miss. 369, 388-89 (1855).

[149] Nebhan v. Mansour, 162 Miss. 418, 422, 139 So. 166, 167 (1932).

Finally, declarations by a principal may be introduced as an admission of the principal's surety.[150]

RULE 802. HEARSAY RULE[151]

Rule 802, the general rule excluding hearsay, provides that hearsay is not admissible unless allowed by the rules of evidence, other rules prescribed by the Supreme Court, or by acts of Congress. Thus, this rule permits admission of hearsay, authorized by federal statute or by other federal rules, that would not otherwise qualify under the evidentiary rules.

The Federal Rules of Civil and Criminal Procedure contain hearsay provisions endorsed by rule 802. The rules of civil procedure authorize the admission of affidavits to prove service of process,[152] to substantiate a motion based on facts not appearing of record,[153] and in summary judgment[154] and temporary restraining order proceedings.[155] Similarly, the rules of criminal procedure allow the admission of affidavits to show probable cause for the issuance of a warrant[156] and to determine factual issues in connection with motions.[157] Depositions are admissible under both procedural rules.[158]

Several acts of Congress that provide for admission of hearsay are also within the scope of rule 802. The use of affidavits and depositions in certain instances has been authorized by federal legislation.[159] Other statutes,[160] though concerned primarily with authentication of documents and presumptions, have the effect of making a variety of documents and statements admissible.[161] Finally, other acts of Congress[162] deal with the admissibility of public records and records of regularly conducted business activity, as well as with the absence of a record or entry.[163]

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[150] *See, e.g.*, United States Fidelity & Guar. Co. v. Adams County, 105 Miss. 675, 678, 63 So. 192, 194 (1913) (statements by deceased justice of peace admissible in suit against surety on his bond); State v. Stewart, 36 Miss. 652, 656 (1859) (in action against guardian's surety, inventory showing guardian's receipt of ward's assets admissible against surety).

[151] FED. R. EVID. 802 provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." See Evidence 🔑 314(1).

[152] FED. R. CIV. P. 4(g).

[153] *Id.* 43(e).

[154] *Id.* 56.

[155] *Id.* 65(b).

[156] FED. R. CRIM. P. 4(a).

[157] *Id.* 47.

[158] *Id.* 15; FED. R. CIV. P. 32.

[159] *See, e.g.*, 10 U.S.C. § 7730 (1970) (in suits involving naval claims when witness is unavailable); 18 U.S.C. § 3190 (1970) (in extradition proceedings); 19 U.S.C. § 1402(b) (1970) (to show foreign value of exports); 21 U.S.C. § 371(g) (1970) (transcript of FDA hearings on regulations admissible in other proceedings); 29 U.S.C. § 161(4) (1970) (to show proof of service in NLRB proceedings).

[160] *See generally* 4 WEINSTEIN'S EVIDENCE ¶ 802[02], at 802-4, -6 (1975).

Mississippi follows the common law exclusion of hearsay, except when admissible as an exception.[164] Although Mississippi has no statutory parallel to rule 802, there are several legislative enactments permitting Mississippi courts to admit hearsay that is not related to a traditional exception. Illustrative of these statutes are those which govern the admissibility of depositions,[165] make particular documents evidence of title,[166] and provide that findings by specific government officials are evidence of the facts found.[167] Other statutes make inspection certificates evidence of the facts contained therein[168] and provide that certain documents are admissible as to specified facts.[169] Similarly, affidavits may be used to prove exhibits to a bill or answer,[170] to dissolve an injunction by motion,[171] and to substitute for a personal appearance by a subscribing witness to a will.[172] Finally, if Mississippi adopts the proposed rules of civil procedure for actions in circuit, chancery, and county courts, these rules will probably admit hearsay by affidavit in limited instances.[173] These examples are not exhaustive, but illustrate the types of records and documents whose admissibility in Mississippi courts are governed by specific statutes.

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[161] *See, e.g.*, 7 U.S.C. § 1622(h) (1970) (inspection certificates of products in interstate commerce); 17 U.S.C. § 210 (1970) (catalog of copyright entries prima facie evidence of facts about copyright registration); 26 U.S.C. § 6340(b) (1970) (record of tax sale evidence of truth of matters stated).

[162] *See generally* 4 WEINSTEIN'S EVIDENCE ¶ 802[02], at 802-6, -7 (1975).

[163] *See, e.g.*, 12 U.S.C. § 1820(d) (1970) (FDIC records); 47 U.S.C. § 412 (1970) (documents filed with FCC); 49 U.S.C. § 916(d) (1970) (ICC tariffs and rates).

[164] Pevey v. Alexander Pool Co., 244 Miss. 25, 31, 139 So. 2d 847, 850 (1962).

[165] MISS. CODE ANN. § 13-1-232 (Supp. 1977).

[166] *E.g.*, *id.* § 11-21-35 (1972) (final decree and decree of confirmation in partition proceeding evidence of all questions of title); *id.* § 13-1-115 (tax collector's conveyance and list of lands prima facie evidence of sale); *id.* § 63-21-19 (certificate of title to vehicle is prima facie evidence of facts appearing therein).

[167] *E.g.*, *id.* § 13-1-25 (findings or reports of official as to status of military and naval personnel or federal civilian employees); *id.* § 13-1-99 (certified copy of records from other states admissible).

[168] *See id.* § 13-1-113 (surveyor's certificate is prima facie evidence of facts therein); *id.* § 75-55-29 (state chemist's analysis of petroleum products, certified by affidavit, is competent evidence).

[169] *See id.* § 13-1-81 (certificate by person purporting to be federal or state officer is prima facie evidence of the official character of such person); *id.* § 13-1-109 (makes admissible certified copies of survey field notes and maps in custody of certain government officials); *id.* § 13-1-145 (posted notice, together with affidavit of posting, constitutes prima facie evidence of what it states); *id.* § 75-1-202 (makes certain third party documents prima facie evidence of authenticity and genuineness of facts stated therein).

[170] *Id.* § 11-5-35.

[171] *Id.* § 11-13-31.

[172] *Id.* § 91-7-9 (affidavit of subscribing witness to will admissible without personal attendance); *see id.* § 91-7-10 (Supp. 1977) (similar provision applicable to holographic wills or codicils).

Rule 803. Hearsay Exceptions; Availability of the Declarant Immaterial

The Federal Rules of Evidence establish several exceptions to the general hearsay exclusion and divide these exceptions into two broad categories, represented by rules 803 and 804. Rule 804 applies to those exceptions which are applicable only if the declarant is not available.[174] Rule 803, however, has no unavailability mandate and admits declarations even if the declarant is present in the courtroom.[175]

Historically, certain declarations were classified as hearsay exceptions because necessity and trustworthiness justified their admission. Although modern developments have resulted in some changes, the federal exceptions are the product of the same necessity and trustworthiness rationales. In order to provide a general understanding of the reason for the exceptions, the discussion of each exception will begin with a consideration of these rationales.

Rules 803(1) and (2). Present Sense Impressions, Excited Utterances, and Res Gestae[176]

Paragraphs (1) and (2) of rule 803 represent the federal rules' adoption of the present sense impression and excited utterance exceptions to the rule against hearsay. Although applied differently, both paragraphs are founded on the theory that statements made when "conditions of self-interest could not have been brought fully to bear" are inherently trustworthy.[177]

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[173] *See* Miss. R. Civ. P. 4(d), 43(e), 56, 65(b) (1977 draft) (the subject matter of these rules corresponds to similarly numbered Federal Rules of Civil Procedure).

[174] See notes 667 through 699 and accompanying text *infra*.

[175] It should be noted that the federal exceptions are phrased in the negative—nonapplication of the hearsay exclusionary rule—rather than in the positive language of admissibility. The drafters felt that this approach was necessary "in order to repel any implication that other possible grounds for exclusion are eliminated from consideration." Fed. R. Evid. 803, Advisory Comm. Notes.

[176] Fed. R. Evid. 803(1) provides: "Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter [is admissible despite the declarant's availability]." *Id.* 803(2) provides: "Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition [is admissible despite the declarant's availability]." See Criminal Law 🔑 363, 366, 368; Evidence 🔑 118-128½.

The basic difference between these exceptions is the time lapse allowable between the event and the hearsay declaration. For a declaration to be admissible under the present sense impression exception of paragraph (1), the declaration must be made contemporaneous to the event or condition described.[178] The excited utterance exception of paragraph (2), however, need only be made "under the stress of excitement caused by the event or condition,"[179] and excitement has been found to exist for hours after the event's actual conclusion.[180] To compensate for its strict timing requirement, the paragraph (1) present sense impression exception does not contain the requirement of paragraph (2) that the event or condition be a startling one. Thus, paragraph (1) is applicable to all events.

In determining contemporaneousness under paragraph (1), or lingering excitement under paragraph (2), the time lapse between the event and the declaration is not the only factor to be considered;[181] the opportunity to reconstruct mentally and alter beneficially the event is also significant.[182] Under a strictly factual analysis, declarations ranging from a few minutes[183] to several hours[184] after the event have been determined to have sufficient contemporaneity.

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[177] McCurdy v. Greyhound Corp., 346 F.2d 224, 226 (3d Cir. 1965). For a specific rationale supporting the admission of excited utterances, see Chestnut v. Ford Motor Co., 445 F.2d 967, 972 (4th Cir. 1971) (utterances are admissible if "uttered under the stress of excitement produced by a startling event and made before the declarant has had time or opportunity to reflect or contrive").

In Sanitary Grocery Co. v. Snead, 90 F.2d 374 (D.C. Cir. 1937), the court explained the trustworthiness rationale:

> "[U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy . . . ."

Id. at 376 (quoting 3 J. WIGMORE, *supra* note 4, at § 1747). *See generally* Note, 45 CORNELL L.Q. 810, 811 (1960).

[178] FED. R. EVID. 803(1); *see* Comment, *The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 DICK. L. REV. 347 (1977). Contemporaneity is not, however, a strict requirement, and a slight time lapse is allowable. FED. R. EVID. 803(1)-(2), Advisory Comm. Notes.

[179] FED. R. EVID. 803(2).

[180] See notes 183 through 184 and accompanying text *infra*.

[181] *See, e.g.*, United States v. Glenn, 473 F.2d 191, 194 (D.C. Cir. 1972). "[I]t is not decisive that an appreciable time elapsed between infliction of the injury and the making of the statement." *Id.*

[182] *See, e.g.*, United States v. Kearney, 420 F.2d 170, 175 n.11 (D.C. Cir. 1969). "[W]hat must be taken into account is not only the length of the intervening time period

A practical problem in substantiating the existence of contemporaneity or lingering excitement is whether the statement itself can be proof of the existence of that condition. This question has been termed "academic" by the federal rules' drafters, since a statement under this exception will normally be heard by an observer who can report any circumstantial evidence indicating the condition.[185] Nevertheless, the only available evidence of the condition may be the statement itself. Thus, a resolution of this "academic" question could be determinative of the admissibility of the statement.[186]

An important sidelight to the "stress of excitement" determination is whether the declaration caused by excitement may describe any related past event. Rule 803(2) provides that the statement must "relate" to the exciting event and that the declarant's stress must be "caused by the event." This language appears to require that the declaration describe the startling events, but a recent Ninth Circuit decision allowed hearsay testimony that a kidnap and assault victim had exclaimed, "He killed me, he killed me," when shown a picture of the defendant long after the alleged crime had occurred.[187] The Ninth Circuit resolved the apparent conflict by holding that the statement must be caused by a

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but also an assessment of the declarant's activities and attitudes in the meanwhile, whether, *e.g.*, there was occasion for deviation from the truth under the impetus of reflection." *Id.*

[183] *See, e.g.*, United States v. Glenn, 473 F.2d 191, 195 (D.C. Cir. 1972) (statement was "only minutes" later and was therefore admissible); Virgin Islands v. Carr, 451 F.2d 652, 657-58 (3d Cir. 1971) (statement made "shortly after" the event and while the declarant was "under the emotional stress occasioned by the occurrence" was admissible); Wabisky v. D.C. Transit, 309 F.2d 317, 318 (D.C. Cir. 1962) (statement was admissible when made "15 or 20 minutes later and while the declarant seemed to be very upset").

[184] *See, e.g.*, United States v. Fountain, 449 F.2d 629, 631-32 (8th Cir. 1971) (statement made 8 hours after the kidnapping but immediately after the rescue was admissible), *cert. denied*, 405 U.S. 929 (1972); United States v. Kearney, 420 F.2d 170, 175 (D.C. Cir. 1969) (utterances 12 hours later admissible, but court acknowledged that this was a technical deviation from the excited utterance admissibility requirements). *But see* United States v. Moss, 544 F.2d 954, 958 (8th Cir. 1976) (defendant's incriminating statement not admissible despite government's contention of "continuous unrelieved excitement and celebration" because it was made several hours after the completion of the crime), *cert. denied*, 429 U.S. 1077 (1977).

[185] FED. R. EVID. 803(1)-(2), Advisory Comm. Notes.

[186] *See* United States v. Napier, 518 F.2d 316, 317-18 (9th Cir.) (statements admissible to show the excitedness), *cert. denied*, 423 U.S. 875 (1975); Milwaukee Gear Co. v. Charles Benjamin, Inc., 466 F.2d 588, 590-91 (3d Cir. 1972) (same). *But see* Doss v. Apache Power Co., 430 F.2d 1317, 1322 (5th Cir. 1970) (applying Texas law, court required independent proof that an exciting event had occurred).

[187] United States v. Napier, 518 F.2d 316, 317 (9th Cir.), *cert. denied*, 423 U.S. 875 (1975).

startling event, but it must only "relate" to the event that is at issue in the suit.[188] The court found that these requirements were met because the statement was the result of the exciting event of showing the declarant the photograph, and the statement "related" to the event at issue by identifying the assailant.[189]

In conclusion, there are various observations concerning the general admissibility requirements of both excited utterances and present sense impressions that should be made. Like all rule 803 exceptions, the availability of the declarant is immaterial in determining the applicability of either exception.[190] Additionally, the declarant may be a participant in the event described[191] or he may be a mere observer,[192] and admissibility is not affected by the fact that the declaration was solicited.[193] Finally, the use of excited utterances has been held not to violate a criminal defendant's right of confrontation.[194]

The Mississippi decisions concerning present sense impressions and excited utterances have all been decided in terms of the nebulous res gestae concept, but res gestae goes beyond these two exceptions. Literally meaning "things done,"[195] the concept encompasses all things closely connected with an act or occurrence. Res gestae is a broad evidentiary rule and, in part, amounts to an exception to the rule against hearsay, admitting evidence of declarations closely connected with an event and excluding evidence of declarations that are not a part of the event.

The obscurity of res gestae has allowed it to serve "as a convenient escape from the hearsay rule in two primary situations."[196] First, the rule is used to admit statements that are not actually hearsay. Sometimes called "verbal acts," these statements are themselves a part of the transaction or event at issue.[197] For example, they might include statements that constitute a part of the formation or breach of a contract, statements involved in an action for slander or libel, or statements offered to prove circumstantially a condition of mind such as knowledge, notice, or intent. In these instances, the statements are offered to prove their existence or to elucidate the event, not to prove the truth of their contents.[198] Second, res gestae is used to admit certain statements that are genuinely hearsay. These statements fall within narrow and distinct exceptions to the hearsay rule, such as the present sense impression and excited utterance exceptions.[199] Unfortunately, Mississippi clings to res gestae in these situations and has not analyzed admissibility in terms of the more narrow exceptions.

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[188] 518 F.2d at 317-18. *But see* Church v. Cochran, 480 F.2d 155, 156 (5th Cir. 1973) (excited utterance by the declarant that he was covered by insurance was not admissible because it did not relate to the exciting event).

[189] 518 F.2d at 318.

[190] Fed. R. Evid. 803. *Compare* United States v. Fountain, 449 F.2d 629, 631-32 (8th Cir. 1971) (statement admissible despite the declarant's availability), *cert. denied,* 405 U.S. 929 (1972) *with* United States v. Napier, 518 F.2d 316, 317 (9th Cir.) (statement admissible despite the declarant's unavailability), *cert. denied,* 423 U.S. 875 (1975).

[191] *E.g.,* United States v. Glenn, 473 F.2d 191, 194-95 (D.C. Cir. 1972); United States v. Kearney, 420 F.2d 170, 175 (D.C. Cir. 1969).

[192] *E.g.,* McLaughlin v. Vinzant, 522 F.2d 448, 449-51 (1st Cir.) (declarant was a bystander), *cert. denied,* 423 U.S. 1037 (1975).

[193] United States v. Glenn, 473 F.2d 191, 194 (D.C. Cir. 1972); *accord,* McCurdy v. Greyhound Corp., 346 F.2d 224, 225-26 (3d Cir. 1965) (statement was a response to an inquiry).

[194] McLaughlin v. Vinzant, 522 F.2d 448, 450 (1st Cir.), *cert. denied,* 423 U.S. 1037 (1975).

[195] Black's Law Dictionary 1469 (4th ed. 1968).

[196] C. McCormick, *supra* note 4, § 288, at 686.

Mississippi courts further add to the confusion by using the concept to justify admission of incidental acts or circumstances, usually nonverbal, which so surround and illustrate the principal occurrence as to constitute a part of it.[200] Examples include continuous acts or a series of events leading up to or closely connected with a principal occurrence,[201] evidence having a close relation to a charged offense in a criminal case,[202] and evidence of other offenses so closely connected to a charged criminal offense as to constitute one occurrence.[203]

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[197] *See, e.g.,* Simon v. Dixie Greyhound Lines, Inc., 179 Miss. 568, 578, 176 So. 160, 162 (1937).

> "It is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, nor that it was made under such circumstances as to compel the conviction of its truth. The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent; in the other it is not."

Id. (quoting Mayes v. State, 64 Miss. 329, 333, 1 So. 733, 735 (1886). *See also* Hall v. Clopton, 56 Miss. 555 (1879)).

[198] *See, e.g.,* Baldwin v. Flash, Preston & Co., 58 Miss. 593, 601 (1881) (a writing accompanying and evidencing a surrender of goods to the trustee in a trust deed conveying them is admissible in evidence as a part of the res gestae of the surrender).

[199] C. McCormick, *supra* note 4, § 288, at 686; 29 Am. Jur. 2d *Evidence* § 708, at 772 (1967).

[200] *See, e.g.,* Meek v. Perry, 36 Miss. 190, 260 (1858).

> The affairs of men consist of a complication of circumstances, so intimately interwoven, as to be hardly separable from each other . . . . These surrounding circumstances, constituting a part of the *res gestae,* may always be shown to the jury, along with the principal fact; and their *admissibility is determined by the judge* . . . . The principal points of attention are, whether the *circumstances and declarations* offered in proof were *contemporaneous* with the *main fact* under consideration, and whether they were *so connected* with it, *as to illustrate its character.*

Id.

[201] *See, e.g.,* Ballow v. State, 221 Miss. 776, 780, 74 So. 2d 854, 855 (1954) (in prosecution for armed robbery, all acts and declarations of parties from the time they arrived at

The use of res gestae has been inconsistent and confusing in all jurisdictions, including Mississippi. The Mississippi Supreme Court has acknowledged that res gestae is incapable of definition. In *McCaskill v. State*,[204] the court said:

> "The rule as to the admissibility of evidence known as the 'res gestae rule' has been declared to be incapable of any precise definition, and it has been applied to so many different and unrelated situations that it has been said that the difficulty of formulating a description of 'res gestae' which will serve for all cases seems insurmountable."[205]

Thus, it is difficult to delineate any specific guidelines of admissibility other than the general res gestae requirement that the statement be so closely connected that it constitutes a part of the occurrence. In meeting this requirement, the key factor is the spontaneity of the statement.[206] Spontaneity is considered a guarantee of trustworthiness because of the belief that a statement made instinctively and contemporaneously, without the opportunity for reflection or fabrication, is likely to be truthful.

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the house until crime was committed were admissible as part of the res gestae); Tucker v. Gurley, 176 Miss. 708, 723-24, 170 So. 230, 233 (1936) (in action for wrongful killing by deputies, evidence that handcuffs were placed on deceased admissible as res gestae since closely connected with the principal facts); McCormick v. State, 159 Miss. 610, 613, 132 So. 757, 757 (1931) (events immediately preceding and leading up to homicide admissible as part of res gestae). Compare the facts in those cases with Willis v. State, 250 Miss. 334, 338, 165 So. 2d 154, 155 (1964), where the court properly excluded events which were not even remotely connected in time or with events out of which an alleged disturbance arose.

[202] *See, e.g.*, Butler v. State, 320 So. 2d 786, 788 (Miss. 1975) (in prosecution for murder of one victim, photographs showing bodies of all victims admissible as part of the res gestae); Cook v. State, 242 Miss. 29, 33, 134 So. 2d 151, 152 (1961) (torn pants belonging to husband of prosecutrix, used for tying victim, were part of the res gestae and properly admitted in prosecution for rape); Cameron v. State, 233 Miss. 404, 422, 102 So. 2d 355, 363 (1958) (in prosecution for rape, the bloody clothing of the victim was admissible as part of the res gestae).

[203] *See* Hosey v. State, 300 So. 2d 453, 454 (Miss. 1974) (evidence of simultaneous armed robberies admissible as part of the res gestae in prosecution for one of the armed robberies); Ellis v. State, 255 So. 2d 325, 326 (Miss. 1971) (evidence concerning a forged check other than the check involved admissible as part of the res gestae since both forgeries occurred at one time); Grinnell v. State, 230 So. 2d 555, 556 (Miss. 1970) (in manslaughter prosecution, evidence of details of death of persons other than one for which defendant was being tried was admissible as part of res gestae).

[204] 227 So. 2d 847 (Miss. 1969).

[205] *Id.* at 852 (quoting Starks v. State, 245 Miss. 238, 242-43, 147 So. 2d 503, 505 (1962)).

[206] *See* Williams v. State, 220 Miss. 800, 810, 72 So. 2d 147, 151 (1954) ("The acts and words must be spontaneous, and so closely related in time to the occurrence in question as reasonably to appear to be evoked and prompted by it."). *See generally* Tyler v. Powell, 262 So. 2d 645 (Miss. 1972).

There are a number of circumstances that may be considered in determining the spontaneity of a statement,[207] but the Mississippi Supreme Court seems to concentrate on whether the statement is contemporaneous to the principal occurrence. Contemporaneity is not subject to a fixed time formula; nonetheless, many Mississippi decisions cannot be reconciled, even when this flexible factor is taken into consideration.

In criminal cases, accusations and other statements made immediately after the occurrence have been considered both admissible as a part[208] and inadmissible as not a part[209] of the res gestae. In *Martin v. State*,[210] statements made by the victim's husband to police officers, who arrived on the scene two or three minutes after receiving a radio call, were held to be part of the res gestae.[211] Yet, in *Haney v. State*,[212] the victim's statement identifying his assailant, made shortly after the firing of the gun, estimated by one witness as one or two minutes later, was considered not a part of the res gestae.[213]

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[207] To determine the spontaneity of a statement, consideration must be given the time elapsed, condition of the declarant, influence of intervening occurrences, and the nature and circumstances of the statement. 31A C.J.S. *Evidence* § 419, at 1029-36 (1964).

[208] *See* Martin v. State, 240 So. 2d 132, 133 (Miss. 1970) (statements by victim's husband, made to police officers that arrived two or three minutes after receiving call, were considered part of the res gestae); Gamble v. State, 254 Miss. 822, 827, 183 So. 2d 172, 173 (1966) (testimony of witness about accusation made by a burn victim before she was taken to hospital admissible as part of res gestae); Thompson v. State, 220 Miss. 200, 206, 70 So. 2d 341, 343 (1954) (in prosecution for murder, testimony as to deceased's statement immediately upon being stabbed, "J.C. done cut me," admissible as part of the res gestae); Knight v. State, 215 Miss. 251, 255-56, 60 So. 2d 638, 640 (1952) (testimony of witness' statements made immediately after deceased had been shot in witness' presence admissible as part of res gestae); Cole v. State, 172 Miss. 19, 22-23, 159 So. 296, 297 (1935) (statement to defendant's father immediately before decedent's death admissible as part of res gestae in manslaughter prosecution); Magee v. State, 145 Miss. 227, 236-37, 110 So. 500, 501-02 (1926) (outcry of deceased after shots were fired that his wife had killed him admissible as res gestae in murder prosecution).

[209] *See* Thompson v. State, 339 So. 2d 982, 983 (Miss. 1976) (victim's statement approximately 30 minutes after he was shot not a part of the res gestae); Fortner v. State, 56 So. 2d 17, 20 (1952) (in murder prosecution, statements by defendant to first police officers who arrived not a part of the res gestae); Haney v. State, 129 Miss. 486, 495-96, 92 So. 627, 628 (1922) (murder victim's identifying statement made shortly after firing of gun not a part of the res gestae); Lewis v. State, 109 Miss. 586, 589-90, 68 So. 785, 786 (1915) (statement by witness to defendant a few moments after the fatal shot was fired held not a part of the res gestae); Little v. State, 87 Miss. 512, 515-16, 40 So. 165, 166 (1906) (a statement by defendant, made five minutes after striking the final blow, not admissible in exculpation of himself); Mayes v. State, 64 Miss. 329, 331-34, 1 So. 733, 733-36 (1886) (declaration of a person five minutes after he was cut held not part of the res gestae).

[210] 240 So. 2d 132 (Miss. 1970).

[211] *Id.* at 133.

[212] 129 Miss. 486, 92 So. 627 (1927).

[213] *Id.* at 495-96, 92 So. at 627-28.

Similarly, in automobile accident cases, the Mississippi Supreme Court has held statements made immediately before a collision both admissible[214] and inadmissible.[215] For example, in *Houston Contracting Co. v. Atkinson*,[216] the outcry of a driver before she collided with a truck was held admissible as part of the res gestae.[217] But in *Standard Coffee Co. v. Carr*,[218] a bystander's exclamation immediately before a pedestrian was struck by a truck that the pedestrian was "going to try to beat that car across the road" was ruled not a part of the res gestae and thus excluded.[219]

In other automobile cases, postaccident statements ranging from a few minutes to the day after the accident have been held not a part of the res gestae,[220] but this should not suggest that every postaccident statement is inadmissible. In *Tyler v. Powell*,[221] the supreme court recognized that statements amounting to excited utterances are admissible in such circumstances.[222]

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[214] *See* Merchants Co. v. Hutchinson, 186 So. 2d 760, 764 (Miss. 1966) (statement by driver immediately before collision that he had "nowhere to go" constituted a part of the res gestae); Houston Contracting Co. v. Atkinson, 251 Miss. 220, 233, 168 So. 2d 797, 800-01 (1964) (outcry of driver before she collided with truck held a part of the res gestae).

[215] *See* Ideal Cement Co. v. Killingsworth, 198 So. 2d 248, 251 (Miss. 1967) (witness' remark, "Damn, he's in a helluva hurry," made about a quarter of a mile from accident was not a part of the res gestae); Phillips v. Dow Chem. Co., 247 Miss. 293, 307, 151 So. 2d 199, 204 (1963) (decedent's statement after accident that just before collision he told driver to watch lights was not a part of the res gestae); Standard Coffee Co. v. Carr, 171 Miss. 714, 723, 157 So. 685, 687 (1934) (exclamation of witness that pedestrian was going to try to beat car across the road held not part of the res gestae).

[216] 251 Miss. 220, 168 So. 2d 797 (1964).

[217] *Id.* at 223, 168 So. 2d at 800-01.

[218] 171 Miss. 714, 157 So. 685 (1934).

[219] *Id.* at 723, 157 So. at 687.

[220] *See* Tyler v. Powell, 262 So. 2d 645, 647-48 (Miss. 1972) (driver's statement to highway patrolman 15 to 30 minutes after collision not admissible); Coleman v. Ford Motor Co., 240 So. 2d 607, 610-11 (Miss. 1970) (trial court did not abuse its discretion in excluding deceased driver's statement to first person to arrive at scene of automobile accident); Simon v. Dixie Greyhound Lines, Inc., 179 Miss. 568, 577-79, 176 So. 160, 161-62 (1937) (statements of injured man at scene of accident that bus lights blinded him held inadmissible); Woods v. Franklin, 151 Miss. 635, 643, 118 So. 450, 451 (1928) (automobile driver's statement, on day following accident, that brakes had not been working for three or four days held inadmissible); Tuccio v. Smith, 151 Miss. 393, 394, 118 So. 195, 196 (1928) (statements by driver that his brakes had been malfunctioning prior to accident was not part of the res gestae).

[221] 262 So. 2d 645 (Miss. 1972).

[222] *Id.* at 647-48.

The rationale for allowing such statements into evidence through the res gestae exception is stated in Alabama Great S. R.R. v. Shannon, 109 Miss. 230, 68 So. 165 (1915), wherein Chief Justice Smith declared:

> "Since this utterance is made under the immediate and uncontrolled domination of the senses, and *during the brief period when considerations*

As suggested earlier, Mississippi cases involving res gestae are often inconsistent and confusing[223] and frequently do not involve genuine hearsay issues.[224] This difficulty, which is not unique to Mississippi, lies in the vagueness and imprecision of the res gestae concept. More often than not, it is used indiscriminately to admit or reject evidence without a thorough analysis of the issue or explanation of the ruling. Instead, there is only a conclusion that a statement is or is not a part of the res gestae. Even if the ruling is correct, the lack of analysis contributes nothing to the body of evidentiary law.

Criticisms of res gestae are ancient,[225] voluminous,[226] often vehement,[227] and even humorous.[228] The eminent evidence scholar, Professor Morgan, once observed:

> *of self-interest could not have been brought fully to bear by reasoned reflection,* the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him, and may therefore be received as testimony to those facts. The ordinary situation presenting these conditions is an affray or a railroad accident."

Id. at 232, 68 So. at 165 (quoting 3 J. WIGMORE, *supra* note 4, §§ 1746-1747).

[223] An example of a confusing application of res gestae is found in McCaskill v. State, 227 So. 2d 847 (Miss. 1969). The defendant was a doctor charged with murder under a statute that makes the death of the mother resulting from an illegal abortion a crime. At trial the deceased's mother was allowed to testify about a telephone conversation with her daughter on the day before she learned of her daughter's death. She testified that in this conversation her daughter stated to her that she was at the defendant's clinic to have something done about her pregnancy. The trial court found that the statements of the deceased were a part of the res gestae and admitted them. On appeal the Mississippi Supreme Court held that admission of the statements was not an abuse of discretion. *Id.* at 852.

[224] *See, e.g.,* Masonite Corp. v. International Woodworkers of America, 215 So. 2d 691, 698-99 (Miss. 1968) (statements by unidentified picketers held to be admissible as part of the res gestae), *cert. denied,* 394 U.S. 974 (1969); Starks v. State, 245 Miss. 238, 240-45, 147 So. 2d 503, 504-05 (1962) (statement of man beaten and robbed that he could not identify assailant, offered by defendant, was apparently not a part of the res gestae). In *Masonite,* the statements were admitted only to show the temper of the crowd during the picketing. Consequently, no hearsay issue was presented. 215 So. 2d at 698. In *Starks,* the statement was offered for impeachment as a prior statement inconsistent with the victim's subsequent identification of the defendant. Therefore, there was no hearsay problem since the truth of the statement was not at issue. 245 Miss. at 240-45, 147 So. 2d at 504-05.

[225] *See* Thayer, *Bedingfield's Case—Declarations as Part of the Res Gestae,* 15 AM. L. REV. 1 (1881). Speaking of res gestae, Professor Thayer suggested that the "phrase did for [lawyers and judges] what a 'catch-all' does for a busy housekeeper or an untidy one—some things belonged there, others might, for purposes of present convenience be put there." *Id.* at 10.

[226] *See* authorities cited in note 225 *supra* and notes 228 through 233 *infra. See also* C. MCCORMICK, *supra* note 4, § 289, at 687 ("The ancient phrase can well be jetisoned"); Comment, *Res Gestae: A Need for Guidelines,* 42 MISS. L.J. 287 (1971).

[227] See notes 229 through 234 and accompanying text *infra.*

[228] See Moylan, *Res Gestae, or Why is That Event Speaking and What is It Doing in*

> The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as "res gestae." It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.[229]

Similarly, in his famous treatise on evidence, Professor Wigmore said:

> The phrase 'res gestae' has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. No rule of Evidence can be created or applied by the mere muttering of a shibboleth . . . . Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision.[230]

Courts have also been extremely critical of the use of res gestae. In *Chestnut v. Ford Motor Co.*,[231] the Fourth Circuit stated that the "term 'res gestae' should be banished from our vocabulary."[232] Speaking for the Second Circuit in *United States v. Matot*,[233] Judge Learned Hand said, "[A]s for 'res gestae' . . . if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."[234]

The absence of an adequate definition and satisfactory guidelines for res gestae suggests that their formulation has been and always will be impossible. The solution is obvious: discard the res gestae concept in favor of distinct hearsay exceptions and evidentiary rules. Since a substantial number of cases in Mississippi involve statements that are

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This Courtroom?, 63 A.B.A.J. 968 (1977). In this clever and humerous article, hearsay issues in a hypothetical trial are ruled on by two jurists to demonstrate their contrasting styles. While the results of their rulings are identical, their reasoning is profoundly different. *Id.*

[229] Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922).

[230] 6 J. WIGMORE, *supra* note 4, § 1767, at 295.

[231] 445 F.2d 967 (4th Cir. 1971).

[232] *Id.* at 972.

[233] 146 F.2d 197 (2d Cir. 1944).

[234] *Id.* at 198.

arguably present sense impressions and excited utterances, Mississippi should recognize these statements as distinct exceptions to the hearsay rule and establish specific guidelines for their admission without regard to res gestae.

Rule 803(3). Then Existing Mental, Emotional, or Physical Condition[235]

Rule 803(3) permits the admission, as an exception to the hearsay rule, of statements indicating the declarant's contemporaneous mental, emotional, or physical condition. This exception is based on recognition that a person's ability to perceive his own mental or physical condition, coupled with an often imposed requirement of contemporaneity, gives such statements a high degree of trustworthiness.[236] Although the declarant's unavailability is recognized as a justification for many hearsay exceptions, availability of the declarant is immaterial to all rule 803 exceptions. The absence of an unavailability requirement is especially understandable for the 803(3) exception. Since the bystander is less likely to be biased, his testimony about a declarant's contemporaneous utterance is probably more reliable than the declarant's later testimony.

In applying the paragraph (3) exception, it is important to distinguish between statements offered to prove their truthfulness and those offered for some other purpose. If the statement's truthfulness is not an issue, it is not hearsay.[237] Therefore, the exception is only applicable where truthfulness is sought to be established.

Admissible declarations under paragraph (3) include those establishing "intent, plan, motive, design, mental feeling, pain and bodily health."[238] The expansiveness of this exception is of obvious importance, since numerous civil and criminal actions require evidence of a party's mental state. For example, hearsay declarations showing a party's state of mind have been admissible in such varied actions as extortion,[239] harassment,[240] income tax evasion,[241] labor disputes,[242] expulsion of students,[243] mail fraud,[244] and even violation of milk ordinances.[245] Additionally, the declaration is admissible regardless of its form—oral or written.[246]

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[235] Fed. R. Evid. 803(3) provides:

> Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will [is admissible despite the declarant's availability].

See Criminal Law 🔑 415(1), (3), (5); Evidence 🔑 127-28, 268-69, 271(6).

[236] 11 Moore's Federal Practice § 803(3)[4], at VIII-81 (1976).

[237] United States v. Jennings, 527 F.2d 862, 869 (5th Cir. 1976). See notes 35 through 67 and accompanying text *supra*.

[238] Fed. R. Evid. 803(3).

[239] *See, e.g.*, United States v. Adcock, 558 F.2d 397, 404 (8th Cir. 1977) (testimony

In addition to declarations of mental state, rule 803(3) also allows declarations indicating physical condition. This recognition, which is subject to the same principles of trustworthiness discussed above, appears to be grounded in the Supreme Court's holding that "whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony."[247]

The state of mind exception also allows limited admission of statements of memory or belief. These statements are admissible to show their existence,[248] but the rule excludes statements of "memory or belief to prove the fact remembered or believed."[249] The drafters felt the limitation was necessary in order "to avoid the virtual destruction of the

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showing victim's state of mind admissible in extortion case); United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972) (statements concerning victim's wife's fearful state of mind admissible to prove extortion).

[240] *See, e.g.*, Galella v. Onassis, 487 F.2d 986, 996 n.13 (2d Cir. 1973) (in action against photographer for harassment, hearsay declarations of photographed subjects admissible to show their reaction to photographer's antics).

[241] *See, e.g.*, United States v. Diez, 515 F.2d 892, 895 (5th Cir. 1975) (IRS agent's statements of intention admissible in income tax evasion suit), *cert. denied*, 423 U.S. 1052 (1976).

[242] *See, e.g.*, Oneota Dress Co. v. NLRB, 333 F.2d 1, 4 (2d Cir. 1964) (statements that owner's discontinuance of business was motivated by business losses admissible to establish owner's intent).

[243] *See, e.g.*, Monroe v. Board of Educ., 65 F.R.D. 641, 649 (D. Conn. 1975) (principal's statements of intention admissible in expulsion case).

[244] *See, e.g.*, United States v. Chason, 451 F.2d 301, 304-05 (2d Cir.) (third party's statements about source of tickets admissible in mail fraud case to show defendant's "good faith"), *cert. denied*, 405 U.S. 1016 (1971).

[245] *See, e.g.*, Dixie Dairy Co. v. City of Chicago, 538 F.2d 1303, 1309 n.12 (7th Cir. 1976) (statements of intention admissible in defense of milk ordinance violation), *cert. denied*, 429 U.S. 1001 (1977).

[246] *See, e.g.*, Seattle First Nat'l Bank v. Randall, 532 F.2d 1291, 1295 (9th Cir. 1976) (diaries admissible to show state of mind); Purer & Co. v. Aktiebolaget Addo, 410 F.2d 871, 876-77 (9th Cir.) (interoffice correspondence), *cert. denied*, 396 U.S. 834 (1969).

[247] Traveler's Ins. Co. v. Mosley, 75 U.S. (1 Wall.) 397, 404 (1869).

[248] *See, e.g.*, Oberman v. Dunn & Bradstreet, 507 F.2d 349, 351-52 (7th Cir. 1974) (in libel suit, statements that a party would not deal with plaintiff because of libelous statements admissible to show plaintiff's injury); Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 683 (S.D.N.Y. 1963) (in trademark infringement suit, statements by consumers that they "believe this is a Zippo lighter" were admissible to establish consumer confusion).

[249] FED. R. EVID. 803(3).

hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."[250]

In establishing this general prohibition of statements of memory or belief to prove the remembered or believed fact, rule 803(3) recognizes cases involving a will as an exception to the prohibition. This exemption, regarded by the drafters as necessary and expedient,[251] is an abrogation of the *Throckmorton v. Holt*[252] rule prohibiting such admissions and an adoption of more recent authority.[253]

The most controversial aspect of the declarations covered by rule 803(3) has been the use of statements of intention as circumstantial proof of conduct. The controversy began with the Supreme Court's famous decision in *Mutual Life Insurance Co. v. Hillmon.*[254] In *Hillmon,* the factual issue was whether a corpse was that of Mr. Hillmon or, as contended by the defendant life insurance companies, that of another person, a Mr. Walters. The defendant attempted to establish Walters' presence in the area by presenting two letters, written by Walters, which stated that he and Hillmon intended to go to the area. The trial court excluded the evidence as hearsay, but the Supreme Court reversed, stating:

> The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention.[255]

The letters were admitted as proof of Walters' intention to go away, his intention to go with Hillmon, and therefore as evidence of a previous agreement between them to travel together, and Hillmon's intention to travel with Walters. Thus, the decision's broad language created the tripartite problem of using declarations of mental condition as proof of subsequent conduct, previous conduct, and conduct of another.[256]

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[250] *Id.*, Advisory Comm. Note.

[251] *See id.*

[252] 180 U.S. 552 (1901).

[253] *See* Savoy v. Savoy, 220 F.2d 364, 366 (D.C. Cir. 1954) (admitting testimony concerning testator's state of mind at time will was torn).

[254] 145 U.S. 285 (1892).

[255] *Id.* at 295-96.

[256] These problems have been the subject of extensive commentary. *See, e.g.,* Chaffee, *Review of Wigmore's Treatise,* 37 HARV. L. REV. 513, 519 (1924); J. Maquire, *The Hillmon Case—Thirty-Three Years After,* 38 HARV. L. REV. 709, 719-31 (1925); Seligman, *An Exception to the Hearsay Rule,* 26 HARV. L. REV. 146, 155-58 (1912).

Rule 803(3) definitely adopts the first, and least controversial, problem of the *Hillmon* tripartition by allowing the admission of statements of mental condition to establish circumstantially the declarant's subsequent conduct. The adoption was not unexpected, since this use has been widely recognized by the federal courts.[257]

The Supreme Court later addressed the second and third problems in *Shepard v. United States*,[258] where a wife's declaration that her husband had poisoned her was offered to show that her state of mind was not suicidal. Justice Cardozo, in explaining why the statement was inadmissible, attacked the use of statements of mental condition to establish past conduct or conduct of others when he stated:

> The ruling in [*Hillmon*] marks the higher water line beyond which courts have been unwilling to go. . . . Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.
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> The testimony now questioned faced backward and not forward. . . . What is even more important, it spoke to a past act, and more than that, an act by someone not the speaker.[259]

The use of state of mind declarations under rule 803(3) to prove past conduct is somewhat unclear.[260] The rule's exclusion of statements of "memory or belief to prove the fact remembered or believed" reflects a distrust for the use of mental state declarations to infer previous conduct. Although this exclusion would be consistent with prior case law,[261] rule 803(3) does not prohibit all retrospective inferences, and the drafters did indicate an intention to adopt the *Hillmon* doctrine in its entirety.[262]

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[257] *See, e.g.,* United States v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976) (statements of intention may be used to infer that intention was carried out), *cert. denied,* 429 U.S. 1099 (1977); United States v. Calvert, 523 F.2d 895, 910 (8th Cir.) ("out-of-court statement of intention is admissible to prove that declarant subsequently acted in conformity with that intention"), *cert. denied,* 424 U.S. 911 (1976); Baughman v. Cooper-Jarrett, Inc., 391 F. Supp. 671, 674-75 (W.D. Pa. 1975) (same), *aff'd in part, vacated in part,* 530 F.2d 529 (3d Cir. 1976).

[258] 290 U.S. 96 (1933).

[259] *Id.* at 105-06.

[260] An even more difficult problem occurs where the declaration is an indication of both previous and subsequent conduct. Prior to the adoption of rule 803(3), such a declaration was held admissible in United States v. Annunziato, 293 F.2d 373, 378 (2d Cir.), *cert. denied,* 368 U.S. 919 (1961). The correct position is now uncertain.

[261] *See, e.g.,* Smith v. United States, 385 F.2d 252, 254 (8th Cir. 1967) (statements of intent to return car are inadmissible to negate past intent to steal it); United States v. St. Mary, 334 F. Supp. 799, 806 (E.D. Pa. 1971) (tape recording offered to prove past conduct was not admissible); Pope v. United States, 296 F. Supp. 17, 19-20 (S.D. Cal. 1968) (statements not admissible because they related to past events). *But see* Estate of Carter v. Commissioner, 453 F.2d 61, 70 (2d Cir. 1971) ("When intention is at issue, a declaration about it by a person having knowledge of the fact is not excludable simply because it was made some time after the event.").

The most serious problem created by *Hillmon* is the use of mental state declarations to establish the conduct of others. Prior case law[263] and congressional commentary[264] on the rule indicate that such a use would be precluded. Rule 803(3) was, however, recently interpreted as allowing the use of mental state declarations to show past conduct, based on the court's belief that the drafters intended to adopt *Hillmon* in its entirety.[265] If this interpretation stands, it could indicate the expansion of rule 803(3) to include the entire *Hillmon* tripartition.

Mississippi decisions have recognized that statements about existing physical[266] and mental conditions[267] are admissible as hearsay exceptions. Although apparently unaware of the thorny issue involved, Mississippi cases do give insight to the local status of mental state declarations as circumstantial proof of subsequent and previous conduct. The use of mental state declarations to show the design and intent of subsequent conduct has been recently recognized,[268] but there is also early authority which suggested a contrary result.[269] The almost universal recognition of mental state declarations as proof of subsequent conduct would indicate that more recent authority is correct.[270] There is also Mississippi authority concerning the use of mental state declarations to prove previous conduct. A recent Fifth Circuit case, *Bartlett & Co., Grain v. Merchants Co.*,[271] held that a letter introduced to show a barge inspector's mental state during the inspection was inadmissible under Mississippi evidentiary law because the letter was written after the inspection.[272] This decision may indicate that mental state declarations are not admissible to show past conduct. Earlier decisions had recognized such a use, but they can be distinguished as applicable only to will controversies.[273]

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[262] *See* FED. R. EVID. 803(3), Advisory Comm. Note; United States v. Pheaster, 544 F.2d 353, 379 (9th Cir. 1976) ("We read the note of the Advisory Committee as presuming that the *Hillmon* doctrine would be incorporated in full force."), *cert. denied,* 429 U.S. 1099 (1977).

[263] *See* United States v. Brown, 490 F.2d 758, 762-63 (D.C. Cir. 1973) (criticizes use of state of mind declarations as indication of other's conduct); Kivitz v. SEC, 475 F.2d 956, 959-61 (D.C. Cir. 1973) (statements by third party concerning himself and defendant admissible to show third party's state of mind, but not to prove defendant's mental condition).

[264] *See* H.R. REP. No. 650, 93d Cong., 1st Sess. 13-14 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7087. "[T]he Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon,* so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." *Id.* (citation omitted).

[265] *See* United States v. Pheaster, 544 F.2d 353, 379 (9th Cir. 1976) (*Hillmon* doctrine incorporated in full), *cert. denied,* 429 U.S. 1099 (1977).

[266] *See, e.g.,* Mississippi Cent. Ry. v. Turnage, 95 Miss. 855, 855-63, 49 So. 840, 840-44 (1909) (declarations as to present pain admissible).

[267] *See, e.g.,* Bartlett & Co., Grain v. Merchants Co., 323 F.2d 501, 510 (5th Cir. 1963) (court recognized state of mind exception but ruled it inapplicable).

[268] *See* Stennis v. Stennis, 218 So. 2d 717, 717-18 (Miss. 1969) (grantor's statements of intention admissible as proof of delivery).

[269] *See* McRae v. Robinson, 145 Miss. 191, 205, 110 So. 504, 508 (1926) (husband precluded from testifying as to wife's statements about proposed activities).

[270] *See* C. MCCORMICK, *supra* note 4, § 295, at 697.

Rule 803(4). Statements for Purposes of Medical Diagnosis or Treatment[274]

Rule 803(4) codifies the hearsay exception concerning statements made for the purpose of medical diagnosis or treatment. Historically, the rationale underlying this exception was the belief that a patient's desire for proper diagnosis and treatment provided an adequate guarantee of trustworthiness. The rationale was articulated by Judge Learned Hand when he stated:

> A man goes to his physician expecting to recount all that he feels . . . . If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says.[275]

As an additional guarantee of trustworthiness, courts have frequently required that the statements be indicative of present pain, or that they be made prior to the actual treatment.[276] The federal rules, however, abrogate contemporaneity requirements by making the exception applicable to "past . . . symptoms, pain, or sensations."[277]

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[271] 323 F.2d 501 (5th Cir. 1963).

[272] *Id.* at 509-10.

[273] *See, e.g.*, Shehan v. Kearney, 82 Miss. 688, 699, 21 So. 41, 45 (1896). "Our conclusion is that declarations of an alleged testator, whether made before, *after*, or at the time of making the alleged will, as to his testamentary intentions, are, both on the issue of testamentary capacity and of undue influence, competent evidence." *Id. See also* notes 251 through 253 and accompanying text *supra*.

[274] FED. R. EVID. 803(4) provides:

> Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof [are admissible despite the declarant's availability] insofar as reasonably pertinent to diagnosis or treatment.

See Evidence 🔑 128.

[275] Maney v. United States, 112 F.2d 538, 539-40 (2d Cir. 1940).

[276] *See* Continental Cas. Co. v. Jackson, 400 F.2d 285, 292-93 (8th Cir. 1968) (statement admissible because made within an hour of the surgery and while declarant "was ashen gray, cold and still in shock"); Herman v. Satter, 368 F.2d 333, 334 (7th Cir. 1966) (statements inadmissible because made to physician after treatment was given). *See also* C. MCCORMICK, *supra* note 4, § 291, at 698.

It is important to remember that rule 803(4) establishes an exception to the hearsay rule; therefore, it need only be applied where the statement is offered to prove the truth of the matter asserted in the statement.[278] Causing a distortion in the exception's development and application, previous cases have failed to recognize this distinction.[279]

Rule 803(4) abolishes many of the traditional strictures regarding the admissibility of statements made for diagnostic purposes. The rule does not require that the statement be made to a physician,[280] nor is there a requirement that the diagnostic statement be made by a patient.[281] The absence of these requirements creates a strong possibility that multiple hearsay will be introduced under this exception.[282]

The scope of the subject matter admissible under the rule 803(4) exception has been greatly expanded. Although the exception has been generally recognized,[283] it has traditionally been applied only to statements of present condition and not to past experience.[284] Judge Learned Hand attacked this practice as unjustified, stating, "The same reasoning applies with exactly the same force to a narrative of past symptoms . . . . A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment."[285] The drafters of rule 803(4) recognized the logic in this position and extended the rule to include statements of past conditions and medical history.[286]

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[277] FED. R. EVID. 803(4). See notes 284 through 286 and accompanying text *infra.*

[278] See notes 35 through 67 and accompanying text *supra.*

[279] *See, e.g.,* Continental Cas. Co. v. Jackson, 400 F.2d 285, 292-93 (8th Cir. 1968) (statement can be used to show history but not "to prove the truth of the facts related by the patient to the doctor"); Reid v. Quebec Paper Sales & Transp. Co., 320 F.2d 34, 38 (2d Cir. 1965) (admissible to show that they were made, *i.e.*, substantiating doctor's diagnosis, but not to provide truth of matters they contained).

[280] *See* 11 MOORE'S FEDERAL PRACTICE § 803(4)[4], at VIII-100 (1976).

[281] *See* P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 399 n.16 (Supp. 1975).

[282] *See generally* FED. R. EVID. 805.

[283] *See, e.g.,* Britt v. Corporacion Pervana De Vapores, 506 F.2d 927, 930 (5th Cir. 1975) (medical statements of diagnosis or treatment are not excluded by the hearsay rule); Foster v. Crawford Shipping Co., 496 F.2d 788, 791 (3d Cir. 1974) (court acknowledged admissibility of hearsay communication to doctor for purposes of obtaining treatment but excluded evidence); United States v. Cochran, 475 F.2d 1080, 1084 (8th Cir.) (hearsay exception), *cert. denied,* 414 U.S. 833 (1973).

[284] *See, e.g.,* Walker v. Prudential Ins. Co., 127 F.2d 938, 940 (5th Cir. 1942) (upheld trial court's exclusion of statements that suggested origin of the injury); Hartford Accident & Indem. Co. v. Carter, 110 F.2d 355, 356-57 (5th Cir. 1940) (using res gestae argument, court excluded patient's hearsay statement that established his injury's origin).

[285] Meaney v. United States, 112 F.2d 538, 540 (2d Cir. 1940).

[286] FED. R. EVID. 803(4), Advisory Comm. Note.

The admissibility of diagnostic statements which indicate the cause of the condition is a point of concern. Although traditionally suspicious of such statements, courts have occasionally allowed their admission.[287] The rule itself does not speak directly on this issue, but the drafters' note suggests that such statements are admissible unless they tend to establish fault.[288]

Prior to the federal rules, courts generally refused to apply the exception if the doctor to whom the statement was made had examined the patient only to qualify himself as an expert witness.[289] Although this exclusion was well-recognized, the evidence usually reached the jury anyway as the basis of the expert's diagnosis.[290] Noting this inconsistency, as well as the jury's inability to draw such a distinction, the drafters of rule 803(4) felt that the limitation should be abolished.[291]

An analysis of rule 803(4) would not be complete without noting its interplay with the other federal rules. The Advisory Committee specifically observed that the rule was expanded to include statements made to expert witness physicians in order to conform this exception with rule 703.[292] Additionally, congressional reports noted an intention to conform this exception with evidentiary rules on privilege[293] and procedural rules which allow a court to require a party's physical or mental examination.[294] Finally, the judge's discretion under rule 403 to strike any evidence whose prejudicial qualities outweigh its probative value is a potential limitation on all hearsay exceptions.[295]

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[287] *Compare* Brown v. Seaboard Airline R.R., 434 F.2d 1101, 1103-04 (5th Cir. 1970) (patient's statement to physician that "a projection from the train struck him" not admissible because not necessary for plaintiff's treatment) *with* Gaussen v. United Fruit Co., 412 F.2d 72, 74-75 (2d Cir. 1969) (patient's statement to physician that "he had started down a ladder from between decks, twisted his ankle and fell striking his right shoulder" was erroneously excluded).

[288] FED. R. EVID. 803(4), Advisory Comm. Note. "Thus a patient's statement that he was struck by a car would qualify but not his statement that the car was driven through a red light." *Id.*

[289] *See, e.g.*, Padgett v. Southern Ry., 396 F.2d 303, 308 (6th Cir. 1968) ("Statements made to a physician to qualify him to testify as an expert witness are inadmissible in the expert's testimony."). *But see* Nutt v. Black Hills Stage Line, Inc., 452 F.2d 480, 483-84 (8th Cir. 1971) (court allowed testimony of neuropsychiatrist who examined patient for sole purpose of being an expert witness).

[290] *See, e.g.*, Teti v. Firestone Tire & Rubber Co., 392 F.2d 294, 299 (6th Cir. 1968) (subjective statements may be used as basis for diagnosis where evidence appears elsewhere in the record); Reid v. Quebec Paper Sales & Transp. Co., 340 F.2d 34, 38 (2d Cir. 1965) (statements to expert were admissible to show that they were made but not to prove truth of matter they contained).

[291] FED. R. EVID. 803(4), Advisory Comm. Note.

[292] *Id.* FED. R. EVID. 703 establishes the admission requirements for information which forms the basis of expert witness' opinions.

[293] H.R. REP. NO. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7087; *see* FED. R. EVID. 501 (privileges under federal rules).

[294] S. REP. NO. 1227, 93d Cong., 1st Sess. 27 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7073; *see* FED. R. CIV. P. 35 (allows judge to order examination of any party whose physical or mental condition is at issue).

In *Gulf Oil Corp. v. Thatch,*[296] the Mississippi Supreme Court aptly summarized its position on the admissibility of statements made for medical diagnostic purposes, stating, "No hard and fast rule could or should be laid down. . . . The trial judge should have considerable latitude in the exercise of his sound discretion on this question, depending on the issues and the circumstances of the particular case."[297] Within these broad guidelines, which seem to require application of the exception on a case-by-case basis,[298] there are decisions ruling statements of physical condition to be both admissible[299] and inadmissible.[300] In *Thatch*, the patient's statements were ruled inadmissible despite the presence of the circumstantial guarantees of trustworthiness, which generally justify admission.[301]

Rule 803(5). Recorded Recollection[302]

The doctrine of "past recollection recorded," long favored by federal and state courts,[303] is found in paragraph (5) of rule 803. The recorded recollection exception developed as one of two ways that courts would allow the admission of facts forgotten by a witness.[304] One of the means recognized was to allow a witness to look at a document containing the forgotten facts and, with his memory refreshed, testify to those facts without introduction of the document. This was called "present recollection refreshed." If the witness' memory was not sufficiently refreshed and the document itself was introduced as evidence of the facts, this was known as "past recollection recorded." The two concepts were frequently confused, and the courts have criticized attorneys for misusing them.[305] It is also important to draw the distinction for another reason; rule 803(5) applies only to past recollection recorded.

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[295] Fed. R. Evid. 403. The judge may also strike evidence which is needlessly cumulative. *Id.*

[296] 240 Miss. 117, 126 So. 2d 501 (1961).

[297] *Id.* at 125-26, 126 So. 2d at 503.

[298] Other evidentiary rules may also affect admissibility of patient-doctor statements. *See* City of Bay St. Louis v. Johnston, 222 So. 2d 841, 845-48 (Miss. 1969) (public records exception); Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 460, 115 So. 555, 557 (1928) (privileged communications).

[299] *See, e.g.*, Fondren v. Durfee, 39 Miss. 324, 326-27 (1860) (patient's statement that he had a pain in his chest admissible as hearsay exception).

[300] *See, e.g.*, Spears v. State, 241 So. 2d 148, 149 (Miss. 1970) (in abortion proceeding, statements regarding pregnancy held inadmissible hearsay).

[301] 240 Miss. at 125, 126 So. 2d at 503.

[302] Fed. R. Evid. 803(5) provides:

> Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly [is admissible despite the declarant's availability]. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

See Criminal Law 🔑 435; Evidence 🔑 355-57; Witnesses 🔑 253-60. *See generally* Morgan, *The Relation Between Hearsay and Preserved Memory,* 40 Harv. L. Rev. 712 (1927); Note, *Past Recollection Recorded,* 28 Iowa L. Rev. 530 (1943).

[303] United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966); *see* Fed. R. Evid. 803(5), Advisory Comm. Note.

[304] C. McCormick, *supra* note 4, § 299, at 712.

Recorded recollection is included in the rule 803 exceptions because a "guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them."[306] To ensure the continued existence of this guarantee of trustworthiness, rule 803(5) imposes the following requirements of admissibility: (1) the document must pertain to matters about which the witness once had knowledge; (2) the witness must now have an insufficient recollection as to such matters; (3) the document must be shown to have been made or adopted by the witness and reflect his knowledge when the matters were fresh in his memory.[307]

The initial requirement of admissibility is that the witness have firsthand knowledge of the facts recorded. Thus, if the writing sought to be introduced was prepared by another person, this requirement is not met.[308] An exception to the exclusion of writings prepared by others is made where the memorandum was prepared by another but the witness has personal knowledge of its contents and preparation.[309]

Recorded recollection is not admissible unless the witness has insufficient recollection of the facts contained in the document. The requirement of loss of memory was generally recognized prior to the adoption of this rule,[310] and courts sometimes enforced the requirement in an alternate form by finding the writing to be merely repetitive of the witness' testimony and therefore inadmissible.[311] The drafters of rule 803(5) noted that some authorities question the imposition of this requirement because it adds nothing to the accuracy of the statement; however, they felt it was necessary to deter preparation of memoranda as a substitute for conveniently forgetful witnesses.[312] In meeting this requirement, it should be understood that the rule only requires "insufficient recollection" and not complete lack of memory.[313]

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[305] *See, e.g.*, Willmore v. Hertz Corp., 437 F.2d 357, 359-60 (6th Cir. 1971) (court noted confusion between past recollection recorded and present recollection revived and appellant's misunderstanding of the same); J.C. Penney Co. v. NLRB, 384 F.2d 479, 484 (10th Cir. 1967) (court indicated the necessity of distinguishing recorded past recollection from present recollection revived); Goings v. United States, 377 F.2d 753, 760 n.8 (8th Cir. 1967) (same).

[306] FED. R. EVID. 803(5), Advisory Comm. Note.

[307] FED. R. EVID. 803(5). *See also* United States v. Edwards, 539 F.2d 689, 691-92 (9th Cir.), *cert. denied,* 429 U.S. 984 (1976). Although not mandated by rule 803(5), some cases have imposed the additional requirement that the memorandum offered as evidence be the original written statement. C. MCCORMICK, *supra* note 4, § 299, at 712; *see, e.g.*, American Express Co. v. United States, 332 F. Supp. 191, 201-02 (Cust. Ct. 1971) (court refused to admit the memorandum and stated that one of the reasons was the witness' inability to account for the original notes), *aff'd,* 472 F.2d 1050 (C.C.P.A. 1973).

[308] Gilmour v. Strescon Indus., 66 F.R.D. 146, 150 (E.D. Pa.), *aff'd,* 521 F.2d 1398 (3d Cir. 1975).

[309] C. MCCORMICK, *supra* note 5, § 300, at 713. *See also* FED. R. EVID. 803(5), Advisory Comm. Note.

The final criterion of admission is a dual requirement that the writing be made or adopted when the knowledge was fresh in the writer's memory and that the witness vouch for the accuracy of the document. Congress added the "or adopted" language to reconcile the rule with the Jencks Act,[314] thus ensuring the exception's application to multiple participant situations.[315] The requirement that the writing be made or adopted while the event is fresh in the witness' mind is merely a circumstantial guarantee of accuracy.[316] The witness' vouching for the accuracy of the writing, a final assurance of reliability, can be achieved by his testimony that he remembers making the memorandum and that it was correct when made.[317]

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[310] *See, e.g.*, United States v. Marshall, 532 F.2d 1279, 1285-86 (9th Cir. 1976) (chemist's report finding white powder to be cocaine admissible because chemist testified that he had no independent recollection of the test he performed earlier); Asaro v. Parisi, 297 F.2d 859, 863 (1st Cir.) (statement admissible where witness testified that he had "no independent recollection" of its content), *cert. denied*, 370 U.S. 904 (1962).

[311] *E.g.*, Railway Express Agency, Inc. v. Epperson, 240 F.2d 189, 193-94 (8th Cir. 1957).

[312] FED. R. EVID. 803(5), Advisory Comm. Note.

[313] 11 MOORE'S FEDERAL PRACTICE § 803(5)[5], at VIII-114 (1976).

[314] 18 U.S.C. § 3500 (1970).

[315] H.R. REP. NO. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7087; S. REP. NO. 1227, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 28 U.S.C.A., at 580.

[316] *See* United States v. FMC Corp., 306 F. Supp. 1106, 1135-38 (E.D. Pa. 1969), *modified*, 317 F. Supp. 443 (E.D. Pa. 1970). The court explained the basis for this requirement, stating:

> The rationale for this rule is to insure the trustworthiness of the writing embodying the recollection by requiring that it must have been clearly and accurately remembered by the witness at the time of the making of the writing, since the validity of the content of the writing is ordinarily not subject to the test of Cross Examination on which our law places primary reliance for the ascertainment of truth.

306 F. Supp. at 1137 (citations omitted).

[317] *See* United States v. Davis, 487 F.2d 112, 123 (5th Cir. 1973) (police report could be read to jury because drafter testified about his knowledge of recorded events and statement's accuracy at the time it was made); Dickinson Supply, Inc. v. Montana-

Two additional points of practical consideration should be made. First, if the memorandum is admissible, it may be read into evidence, but should not be introduced as an exhibit unless offered by an adverse party. This prohibition was felt necessary in order to prevent the jury from giving the evidence undue weight.[318] Second, there may be considerable overlap between the use of this exception and the application of rules 801(d)(1)[319] and 804(b)(1),[320] particularly if the recordation sought to be admitted is prior testimony.[321]

Although Mississippi decisions generally have not drawn the necessary distinction between present recollection refreshed and past recollection recorded, a synthesis of language from several cases establishes general requirements for the admission of recorded recollection. The first three requirements governing admissibility of past recollection recorded, set forth in the dictum of *Cutshall v. State,*[322] mandate proof of the following elements: (1) the witness "has no present independent recollection of facts set forth therein";[323] (2) the witness "at one time had personal knowledge of such facts";[324] and (3) the witness "knows that the writing is an accurate record thereof."[325] The fourth element appears separately in other cases and requires that the writing be made contemporaneously with the described occurrence.[326] Because these four requirements correspond to the general requirements recited by most authorities,[327] they can be accepted as prerequisites to the admission of recorded recollection in Mississippi. Concerning notes and records that

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Dakota Util. Co., 423 F.2d 106, 109 n.1 (8th Cir. 1970) (use of statements as past recollection recorded failed because witness denied truth of the statement), *cert. denied,* 415 U.S. 981 (1974).

[318] *See* United States v. Senak, 527 F.2d 129, 137-39 (6th Cir. 1975) (court acknowledged that rule 803(5) does not permit a writing to go to the jury, but no error was found in allowing the memorandum to go to the jury because the rule was not effective at that time), *cert. denied,* 425 U.S. 907 (1976).

[319] FED. R. EVID. 801(d)(1). See notes 68 through 98 and accompanying text *supra.*

[320] FED. R. EVID. 804(b)(1). See notes 700 through 725 and accompanying text *infra.*

[321] *See* United States v. Barrow, 363 F.2d 62, 67 (3d Cir. 1966) (grand jury testimony admissible as recorded recollection), *cert. denied,* 385 U.S. 1001 (1967).

[322] 203 Miss. 553, 563, 35 So. 2d 318, 322 (1948).

[323] *Id.* at 563, 35 So. 2d at 322.

[324] *Id.*

[325] *Id.; see* Pearson v. State, 176 Miss. 9, 22-23, 167 So. 644, 648 (1936) (witness required to testify to the correctness of the record).

[326] *See, e.g.,* Martin v. State, 197 Miss. 96, 105-06, 19 So. 2d 488, 490 (1944) (although the attempted use of the recording is unclear, the court was adamant in its requirement of contemporaneity); New Orleans, J. & G.N.R.R. v. Echols, 54 Miss. 264, 271 (1876) (recorded recollection inadmissible because made two years after the described event).

[327] *See* C. MCCORMICK, *supra* note 4, § 299, at 712. See note 307 and acccompanying text *supra.*

a witness uses only to refresh his recollection while testifying, the Mississippi Supreme Court has held that opposing counsel has a right to examine all such records.[328]

Rules 803(6) and (7). Presence and Absence of Business Records[329]

The common law business records exception is incorporated into the Federal Rules of Evidence as rules 803(6) and 803(7). The admissibility of regularly kept records has been the subject of numerous prior attempts at uniformity and reform, including the Commonwealth Fund Act,[330] the Uniform Business Records as Evidence Act,[331] the Model Code of Evidence,[332] and, most recently, the Uniform Rules of Evidence.[333] An understanding of these earlier efforts would facilitate comprehension of the business records exception, but, since the scope of this article prohibits detailed analysis of these attempts, citation to earlier works must suffice.[334]

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[328] Shell Oil Co. v. Pou, 204 So. 2d 155, 158 (Miss. 1967) (error not to permit opposing counsel to examine notes used by physician while testifying); Mississippi State Highway Comm'n v. Howard, 253 Miss. 556, 563, 176 So. 2d 294, 296-97 (1965) (error for trial court to deny opposing counsel an opportunity to view the appraisal notes that witness used to testify).

[329] Fed. R. Evid. 803(6) provides:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge [is admissible despite the declarant's availability], if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Id. 803(7) provides:

> Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) [is admissible despite the declarant's availability] to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

See Criminal Law 🔑 434, 436; Evidence 🔑 350, 352, 354, 361, 376, 383(a).

[330] This act was codified in 28 U.S.C. § 1732 (1970).

[331] 9A U.L.A. 506 (1965).

[332] Model Code of Evidence 514 (1942).

[333] Uniform Rules of Evidence 63(13) (1953).

[334] *See generally* Laughlin, *Business Entries and the Like,* 46 Iowa L. Rev. 276 (1961);

The business records exception is justified, as are all the hearsay exceptions, on the grounds of reliability and necessity. The trustworthiness or reliability element is based on "the premise that record entries made in the usual course of business are likely to be an accurate reflection of the various daily transactions of the business."[335] Furthermore, the continuous checks and balances inherent in an integrated record system provide an added degree of reliability. The element of necessity stems from the inconvenience of calling the individual originally responsible for the record, as well as the unlikelihood that this individual would accurately recall the transaction at issue.[336]

Although each of the codification attempts mentioned earlier has different admissibility criteria, the general rule has been that "[b]usiness records are admissible in federal court as evidence of a transaction or occurrence if made in the regular course of business and if it was the regular course of business to make such records within a reasonable time of the transaction or occurrence."[337] Rule 803(6) has refined this general rule by imposing the following specific admission requirements: (1) the record must be a "memorandum, report, or data compilation, in any form"; (2) it must have been "made at or near the time" of the event's occurrence; (3) it must have been made from "information transmitted by, a person with knowledge"; (4) it must have been "kept in the course of a regularly conducted business"; (5) it must have been "the regular practice" of the business to make such records; and (6) all of these requirements must be shown to the court "by the testimony of the custodian or other qualified witness."[338]

The initial requirement of rule 803(6) contains the broad language that the record need only be a "memorandum, report, record, or data compilation" to be admissible. The fact that the rule characterizes the evidence as memoranda or records suggests that the record must be

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Note, *Business Records Rule: Repeated Target of Legal Reform*, 36 BROOKLYN L. REV. 241 (1970).

[335] Thomas v. Hogan, 308 F.2d 355, 358 (4th Cir. 1962).

[336] C. MCCORMICK, *supra* note 4, § 306, at 720.

[337] United States v. Lipscomb, 435 F.2d 795, 802 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).

[338] FED. R. EVID. 803(6). Compare the above delineation of requirements with those set forth by United States v. Carranco, 551 F.2d 1197 (10th Cir. 1977).

> Federal Rule of Evidence 803(6) requires that (1) the report be made at or near the time of the event under consideration, (2) the record be kept in the course of regularly conducted business, (3) it was the regular practice of that business to make the record, (4) the source of information or methods or circumstances of preparation [do] not indicate lack of trustworthiness. The evidence rule also states that either a custodian or "other qualified witness" could testify to the fact that the record was kept in the regular course of business.

Id. at 1200.

written. Although this was a point of controversy in earlier rules, the federal rules' use of the term "in any form" indicates a requirement of relative permanence, but not necessarily one of inscription.[339]

Two additional problems encountered in determining the types of admissible records are, first, whether the record sought to be admitted must be an "original" and, second, whether alterations or inconsistencies within the record bar its admission. The common law business records exception required that the record be an original;[340] however, federal interpretations have uniformly disregarded such a requirement.[341] A question ancillary to the problem of originals is whether computer printouts qualify for the business records exception. The limited decisions on the question indicate that computer printouts are admissible once the equipment, data control, and program preparation safeguards are shown to be adequate.[342] Questions of admissibility based on inconsistencies in the evidence would appear to be governed by a judge's determination of trustworthiness. Nonetheless, decisions on the question state that inconsistencies, alterations, or ambiguities in the evidence only affect the evidence's weight and not its admissibility.[343]

Extension of the business records exception to include records phrased as opinions, especially conclusory hospital reports, has traditionally been questioned. Prior to the federal rules, there were conflicting decisions dealing with both police[344] and hospital reports.[345] Rule

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[339] *See* C. McCormick, *supra* note 4, § 307, at 720-21.

[340] 5 J. Wigmore, *supra* note 4, § 1532.

[341] *See, e.g.*, United States v. Miller, 500 F.2d 751, 755 (5th Cir. 1974) (originals not necessary because "best evidence rule has repeatedly been held inapplicable to records admitted under the [business records exception]"), *rev'd on other grounds*, 425 U.S. 435 (1976); United States v. Teague, 445 F.2d 114, 119 (7th Cir. 1971) (photocopies of business records admissible under business records exception).

[342] *See* United States v. Scholle, 553 F.2d 1109, 1125 (8th Cir. 1977) (computer printout admissible if there is a showing of properly functioning equipment, procedures for data control, original program delineation and that the general requirements of the Business Records Act are met); United States v. Russo, 480 F.2d 1228, 1239-40 (6th Cir. 1973) (computer printouts satisfy for business records exception application), *cert. denied*, 414 U.S. 1157 (1974); United States v. De Georgia, 420 F.2d 889, 893 n.11 (9th Cir. 1969) ("it is immaterial that the business record is maintained in a computer rather than in company books"). *See generally* Comment, *Admissibility of Computer Business Records as an Exception to the Hearsay Rule,* 48 N.C. L. Rev. 687 (1970); *see also* Fed. R. Evid. 803(6), Advisory Comm. Note ("The expression 'data compilation' . . . includes, but is not limited to, electronic computer storage.").

[343] United States v. Page, 544 F.2d 982, 987 (8th Cir. 1976) (inconsistencies); Ross v. American Export Isbrandtsen Lines, Inc., 453 F.2d 1199, 1200-01 (2d Cir. 1972) (per curiam) (incompleteness); Peter Kiewit Son's Co. v. Summit Constr. Co., 422 F.2d 242, 268 (8th Cir. 1969) (alterations); LaPorte v. United States, 300 F.2d 878, 880 (9th Cir. 1962) (ambiguities).

[344] *Compare* United States v. Smith, 521 F.2d 957, 963 (D.C. Cir. 1975) (business records include police reports and transcripts of police radio broadcasts) *with* Colvin v.

803(6) resolves the conflict in favor of admission by including "opinions or diagnoses" within the record definition.[346]

The second admission requirement for rule 803(6) is that the record be "made at or near the time" of the event's occurrence. This requirement is considered necessary in order to safeguard the record's trustworthiness and accuracy.[347] The requirement is not governed by any strict time limitation between observation and recordation. Instead, courts have great discretion in making this determination, bound only by the requirement that the record be reliable.[348] For computer data to meet this requirement, only the input need be timely; a delay in obtaining a printout of the information will not affect its accuracy.[349]

At one time, admissibility of business records under the common law depended on the recorder having personal knowledge of the facts set forth in the record.[350] Due to the guidance of legislative directives, however, more recent decisions have held that a recorder's lack of personal knowledge goes only to the weight of the evidence and not to its admissibility.[351]

In accord with this trend, rule 803(6) requires that the record be made from "information transmitted by, a person with knowledge." The requirement is necessary to ensure accuracy, since no amount of regularity in entry making or systemization in entry checking will make the record correct when the underlying information is incorrect.[352]

United States, 479 F.2d 998, 1003 (9th Cir. 1975) (police report admission limited to information "based on an officer's observation and knowledge"). For a consideration of admissibility problems involving police records as government business records, see notes 374 & 375 and accompanying text *infra.* A discussion of the admissibility of police reports as public records under rule 803(8) is contained in notes 404 through 406 and accompanying text *infra.*

[345] *Compare* Skogen v. Dow Chem. Co., 375 F.2d 692, 705 (8th Cir. 1967) (hearsay opinion in hospital record about cause of plaintiff's illness held inadmissible because not based upon directly observable facts) *with* Thomas v. Hogan, 308 F.2d 355, 360 (4th Cir. 1962) ("it makes no difference whether the records reflect an expression of medical opinion or an observation of objective fact").

[346] *See* Fed. R. Evid. 803(6), Advisory Comm. Note.

[347] Missouri Pac. R.R. v. Austin, 292 F.2d 415, 422 (5th Cir. 1961). *See generally* C. McCormick, *supra* note 4, § 309, at 724.

[348] *See, e.g.,* Standard Oil Co. v. Moore, 251 F.2d 188, 223 (9th Cir. 1957) (lapse of several months permissible where there is no evidence of unreliability), *cert. denied,* 356 U.S. 975 (1958).

[349] United States v. Russo, 480 F.2d 1228, 1240 (6th Cir. 1973) (11 month delay), *cert. denied*, 414 U.S. 1157 (1974).

[350] United States v. Graham, 391 F.2d 439, 447 (6th Cir.), *cert. denied,* 393 U.S. 941 (1968).

[351] United States v. Morton, 483 F.2d 573, 577 (8th Cir. 1973); Southern Glass & Builders Supply Co. v. United States, 398 F.2d 109, 110 (5th Cir. 1968); United States v. Re, 336 F.2d 306, 313 (2d Cir.), *cert. denied,* 379 U.S. 904 (1964).

[352] *See* C. McCormick, *supra* note 4, § 310, at 725.

A problem of multiple hearsay occurs when the recorder includes in his record hearsay statements made by others. For example, a police officer reporting an event may incorporate into his report a bystander's statement of what occurred. Since there is no safeguard of reliability for incorporated statements, many authorities suggest that each level of hearsay must qualify under an exception.[353] The bystander's statement might be admissible as a declaration against interest, a dying declaration, or a number of other exceptions. It is also possible for the statement contained within the record to qualify as a business record itself, thus resulting in a double application of the business records exception.[354] To qualify for double application of the exception, the hearsay statement within the record must be made in the regular course of business, that is, by a person with a business duty to report accurately and truthfully.[355]

Admissibility requirements (4) and (5) of rule 803(6) create a dual safeguard. The records must be made during the regular course of business, and the making of such records must be a regular practice of the business. These requirements are the crux of the business records exception because the exception's element of trustworthiness is "supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."[356]

Application of the business records exception frequently hinges on interpretation of the phrase "regular course of business"; thus, there have been numerous attempts to define the phrase. The United States Supreme Court stated that the definition "must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."[357] The Fifth Circuit later provided the most thorough explanation of the phrase, defining "regular course of business" to mean that the records must be kept pursuant to some routine procedure designed to assure accuracy, they must be created for motives that would tend to assure accuracy, and they must not themselves be mere cumulations of hearsay or uninformed opinion.[358] As an aid to understanding the definition, both of the first two criteria will be discussed separately; the third is a reiteration of material previously presented.[359]

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[353] *E.g.*, United States v. Smith, 521 F.2d 957, 964 (D.C. Cir. 1975); Laughlin, *supra* note 6, at 298. *See generally* notes 788 through 802 and accompanying text *infra*.

[354] *See* C. McCormick, *supra* note 4, § 310, at 726.

[355] *See, e.g.*, Juaire v. Nardin, 395 F.2d 373, 379 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968). "[T]he best rule is that the original source (the declarant) is not under a duty to tell the truth, or if the statement of the declarant does not itself come under some established hearsay exception, . . . then the police report containing that information is inadmissible." 395 F.2d at 379.

[356] Fed. R. Evid. 803(6), Advisory Comm. Note; *see* Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550, 554 (1st Cir. 1974) ("A crucial aspect of the business-records exception is that entries be prepared as a regular part of the business.").

[357] Palmer v. Hoffman, 318 U.S. 109, 115 (1943).

The requirement of routine procedure in recording equates to the rule 803(6) requirement of regular practice in keeping records.[360] The standard is applied subjectively; courts require proof that the record-keeping is a regular business practice of that particular business.[361] The key to meeting the regularity requirement is a showing that the recording is a continual and not an isolated practice.[362]

The recorder's motive is also a key in determining whether the record was made in the regular course of business. The United States Supreme Court dealt with the issue of motive in *Palmer v. Hoffman,*[363] holding that an accident report was inadmissible because it was prepared for litigation and not for business purposes.[364] Although some subsequent decisions have avoided the issue by feretting out nonlitigation purposes,[365] the drafters of rule 803(6) found motivation to be a "disturbing factor" and concluded that its only importance to the federal rule is as a "source of information . . . indicating lack of trustworthiness."[366]

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[358] Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632, 637 (5th Cir. 1969), *cert. denied,* 396 U.S. 1057 (1970). For a novel application of "in the regular course of business" terminology, see Julander v. Ford Motor Co., 488 F.2d 839, 847-48 (9th Cir. 1973) (court disagreed with manufacturer's contention that record would ordinarily have been destroyed in the regular course of business and therefore its present existence should be disregarded).

[359] See notes 352 through 355 and accompanying text *supra.*

[360] See note 338 and accompanying text *supra.*

[361] *E.g.,* United States v. Plum, 558 F.2d 568, 572 (10th Cir. 1977); Gibbs v. State Farm Mut. Ins. Co., 544 F.2d 423, 428 (9th Cir. 1976); Gray v. L.J. Navy Trucking Co., 475 F.2d 545, 549 (6th Cir. 1973); Gass v. United States, 416 F.2d 767, 771-72 (D.C. Cir. 1969). *See also* H.R. REP. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7087-88.

[362] *See, e.g.,* Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550, 554 (1st Cir. 1974) ("The entry offered must of course be a part of a *series of entries* or *reports,* not a casual or isolated one."); Miller v. Weiner, 298 F. Supp. 1016, 1019 (D.S.C. 1969) (it is the record's "regularity and routine which give rise to trustworthiness"; this "contemplates business records made on a day to day basis").

[363] 318 U.S. 109 (1943).

[364] *Id.* at 111-15.

[365] *See, e.g.,* Taylor v. Baltimore & O.R.R., 344 F.2d 281, 285-87 (2d Cir.) (accident reports made for purposes of reporting accident to Department of Labor are admissible as business records), *cert. denied,* 382 U.S. 831 (1965); United States v. New York Foreign Trade Zone Operators, Inc., 304 F.2d 792, 797 (2d Cir. 1962) (accident report required to be made under Federal Employees Compensation Act admissible as business record). *See generally* 2 WASHBURN L.J. 176 (1962).

[366] FED. R. EVID. 803(6), Advisory Comm. Note.

The final criterion of admissibility under rule 803(6) is that all of the previous requirements be shown to exist "by the testimony of the [record's] custodian or other qualified witness." The common law rule required that a witness testify about the various steps in the recording process to properly authenticate the record,[367] but the complexity of modern business prevented continuation of this requirement. Accordingly, the more recent decisions have merely required the existence of sufficient guarantees of trustworthiness.[368] Rule 803(6) continues this recent trend by providing that "the custodian or other qualified witness"[369] may provide the foundation evidence necessary to show that the records were regularly kept.[370]

The final sentence of rule 803(6) provides a definition of "business." Within this definition, there are two areas of concern, hospital records and government records. Some authorities questioned the admissibility of hospital records because they often contain multiple hearsay, for example, statements from the patient to the doctor, and because they often contain statements in the form of opinions, for example, the diagnosis.[371] Recent decisions, however, have admitted hospital records under the business records exception.[372] Additionally, legislative materials on the federal rules indicate a congressional intent that rule 803(6) extend to all such organizations.[373] Another problem that has developed concerns the admissibility of government records as business records. Although several prerule cases admitted government records under the exception,[374] a recent decision stated that "[t]he business-records exception of rule 803(6) is simply not applicable to government records and reports, which are to be admitted in accordance with the standards of rule 803(8)."[375]

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[367] C. McCormick, *supra* note 4, § 312, at 729.

[368] *See* Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1286 n.37 (5th Cir.) (foundation testimony need not come from the person keeping the records or from the one who had supervision over them), *cert. denied,* 419 U.S. 1096 (1974); United States v. Henderson, 466 F.2d 960, 966 (8th Cir.) (admissibility of records unaffected by the fact that authenticating witness "neither kept them nor supervised their making"), *cert. denied,* 404 U.S. 991 (1971); United States v. Whitaker, 372 F. Supp. 154, 167 (M.D. Pa.) (same), *aff'd,* 503 F.2d 1400 (3d Cir. 1974), *cert. denied,* 419 U.S. 1113 (1975). *But see* United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973) (records inadmissible because authenticating witness had no personal knowledge of how or where they were kept).

[369] Fed. R. Evid. 803(6); *see* United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977) (where no testimony of the record's preparation was offered from the preparing company, an official of the company receiving the record was allowed to testify that the record was received and held in the regular course of business).

[370] *See* S. Rep. No. 1227, 93d Cong., 1st Sess. 17 (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051, 7063-64. For the interplay between this requirement and the requirement that the record be prepared by a person with knowledge, see United States v. Page, 544 F.2d 982, 987 (8th Cir. 1976).

In United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976), the court interpreted rule 803(6) stating, "It is not necessary under the new federal rules of evidence that the declarant be present if the knowledge of the custodian of the record demonstrates that a document has been prepared and kept in the course of a regularly conducted business activity." *Id.* at 671 (footnote omitted).

[371] C. McCormick, *supra* note 4, § 313, at 731.

[372] *See, e.g.*, United States v. Bohle, 445 F.2d 54, 61 (7th Cir. 1971) ("hospitals are included in the statutory phrase 'any business' "); Rivers v. Union Carbide Corp., 426 F.2d 633, 637-38 (3d Cir. 1970) (hospital records admissible); Harris v. Smith, 372 F.2d 806, 816-17 (8th Cir. 1967) (same).

Rule 803(7) deals with the absence of an entry in a record kept in accordance with the requirements of rule 803(6). When an occurrence that would normally be recorded has not been recorded, evidence to that effect is admissible as proof that the activity did not occur.[376] Although it has been stated that such proof is actually nonhearsay,[377] the federal rules classify it as a hearsay exception. Furthermore, it has been suggested that this exception could be used to question the authenticity of a document offered under the business records exception.[378]

Although Mississippi has unquestionably recognized the business records exception,[379] summary treatment and conflicting decisions have clouded the development of specific criteria of admissibility.[380] The 1883 case of *Chicago Railroad v. Provine*[381] is a rare exception to the summary treatment usually accorded the exception. In *Chicago Railroad,* the Mississippi Supreme Court stated that for a business record to be admissible as a hearsay exception, it must be shown (1) "that they [are] fairly and honestly kept";[382] (2) "that they are the books of a party engaged in the business to which they refer";[383] (3) "that the entries were made in the usual course of business, at or about the time the facts entered transpired";[384] (4) "the entries are original and made by a party having knowledge of the facts entered";[385] (5) "that information thereof was communicated to the party by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make record thereof for entry on the books";[386] and (6) that "such report and entry [was] made at the time of the occurrence or before the facts can be supposed to have been passed from his recollection."[387]

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[373] H. CONF. REP. No. 1597, 93d Cong., 1st Sess. 11 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7104.

[374] *See, e.g.*, United States v. Karnap, 477 F.2d 390, 392 (4th Cir.) (Selective Service file), *cert. denied,* 414 U.S. 867 (1973); Southern Glass & Builders Supply Co. v. United States, 398 F.2d 109, 110 (5th Cir. 1968) (government records admitted).

[375] United States v. American Cyanamid Co., 427 F. Supp. 859, 867 (S.D.N.Y. 1977).

[376] United States v. Zeidman, 540 F.2d 314, 318-19 (7th Cir. 1976); *accord,* United States v. De Georgia, 420 F.2d 889, 891-94 (9th Cir. 1969).

[377] *See* Lindheimer v. United Fruit Co., 418 F.2d 606, 607-08 (2d Cir. 1969) (absence of accident report admissible).

[378] *See* United States v. Hay, 376 F. Supp. 264, 280 (D. Colo. 1974) (business record exception "can be utilized to prove a negative, *i.e.*, . . . to establish that a record is not authentic"), *aff'd,* 527 F.2d 990 (10th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976).

[379] The Mississippi Supreme Court, in Grenada Cotton Compress Co. v. Atkinson, 94 Miss. 93, 47 So. 644 (1908), endorsed the exception, stating:

> We desire, however, to give our approval to the admirable statement of the modern rule contained in Wigmore on Evidence, § 1530. It is there said: "The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so."

Id. at 100, 47 So. at 646.

[380] *Compare* Hardenstein v. Brien, 96 Miss. 493, 499, 50 So. 979, 980 (1910) (physician's private records admissible to show dates and number of visits) *with* Wooten v.

Two of the specific problems discussed earlier, hospital records and computer printouts, have been considered by the Mississippi legislative and judicial branches. Although there may be some overlap of the business records exception and the public records exception in this area,[388] there are statutory directives governing the evidentiary use of hospital records.[389] In the computer records area, the Mississippi judiciary has

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Mobile & O.R.R., 89 Miss. 322, 327, 42 So. 131, 131 (1906) (private records kept by a private corporation not admissible).

[381] 61 Miss. 288 (1883).

[382] *Id.* at 292; *see* Hayes v. National Sur. Co., 169 Miss. 676, 700, 153 So. 515, 519 (1934) (ledger sheets and accounts authenticated by witness who had knowledge of their maintenance); Illinois Cent. R.R. v. Butterfield Lumber Co., 95 Miss. 357, 357, 49 So. 179, 180 (1909) (weighmaster's book inadmissible because no evidence produced to show accuracy).

[383] 61 Miss. at 292; *see* Panola County Bank v. J.O. Nessen Lumber Co., 117 Miss. 583, 589-90, 78 So. 516, 518-19 (1918) (records showing amount of lumber admissible where recorder testified about making the entries).

[384] 61 Miss. at 292; *accord,* Greene v. Greene, 145 Miss. 87, 109, 110 So. 218, 223 (1926); *see* Finley v. Armstrong, 117 Miss. 289, 298, 78 So. 177, 178 (1918) (regularly kept books of account admissible to show cash charges).

[385] 61 Miss. at 292. The requirement of originality is no longer applicable to business records. *See* MISS. CODE ANN. § 13-1-151 (1972) (photostatic copies of business records admissible as if they were originals).

[386] 61 Miss. at 292.

[387] *Id.*

[388] *See* City of Bay St. Louis v. Johnston, 222 So. 2d 841, 845-48 (Miss. 1969).

[389] The specific requirements are set out in MISS. CODE ANN. §§ 41-9-101 to -119 (1972). *See generally* City of Bay St. Louis v. Johnston, 222 So. 2d 841, 843-44 (Miss. 1969) (hospital records admitted by this statute despite their hearsay character); *see also* Jones v. State, 330 So. 2d 597, 600 (Miss. 1976) (refusing admission of medical records was within the trial court's discretion). Mississippi also has statutory authority allowing notice of dishonor in a commercial paper action to be proved by records kept in the usual course of business. MISS. CODE ANN. § 75-3-110(c) (1972).

recognized the growing use of computers, as well as the admissibility problems that accompany this growth, and has delineated specific requirements governing the admission of computer records.[390]

Rule 803(8). Public Records and Reports[391]

Rule 803(8) recognizes the hearsay exception of public records and reports. The exception is based on the rationale that the necessity and trustworthiness found in public documents warrant their admission. The use of public records is considered necessary because of the inconvenience of requiring the continuous judicial appearance of public officials, as well as the unlikelihood that they will recall any details.[392] The official duty to keep records and the multitude of similar records gives the exception its special quality of trustworthiness.[393] Because of these qualities, the hearsay exception of public records has been the subject of countless statutes.[394] Prior to the adoption of the Federal Rules of

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[390] *See* King v. State *ex rel.* Murdock Acceptance Corp., 222 So. 2d 393, 397-98 (Miss. 1969), *noted in* 41 MISS. L.J. 604 (1970), in which the court states that a computer printout is admissible as a business record

> if it is shown (1) that the electronic computing equipment is recognized as standard equipment, (2) the entries are made in the regular course of business at or reasonably near the time of the happening of the event recorded, and (3) the foundation testimony satisfies the court that the sources of information, method and time of preparation were such as to indicate its trustworthiness and justify its admission.

[391] FED. R. EVID. 803(8) provides:

> Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law [are admissible despite the declarant's availability], unless the sources of information or other circumstances indicate lack of trustworthiness.

See Criminal Law 🔑 429; Evidence 🔑 333-49.

[392] United States v. Van Hook, 284 F.2d 489, 493 (2d Cir. 1960), *rev'd on other grounds,* 365 U.S. 609 (1961); *accord,* Gilbert v. Gulf Oil Corp., 175 F.2d 705, 710 (4th Cir. 1949) (public documents exception to hearsay rule was "designed to obviate the constant attendance of public officers in court to prove routine matters").

[393] *See* Webster v. Estelle, 505 F.2d 926, 930 (5th Cir. 1974) (emphasizing the "habit of honesty and accuracy in the performance of such duties"), *cert. denied,* 421 U.S. 918 (1975); Smith v. Spina, 477 F.2d 1140, 1146 (3d Cir. 1973) (reiterating the "assumption that a public officer will perform his duty properly"); United States v. Van Hook, 284 F.2d 489, 493 (2d Cir. 1960) (same), *rev'd on other grounds,* 365 U.S. 609 (1961).

[394] *See* C. MCCORMICK, *supra* note 4, § 315, at 735 (the exception is largely governed by statutes that minutely and variously regulate the admissibility of particular records and documents). *See generally* Wallace, *Official Written Statements,* 46 IOWA L. REV. 256 (1961).

Evidence, the applicable federal statute was 28 U.S.C. § 1733(a).[395] Rule 803(8) utilized both the common law and the federal statutory exception to expand the admissibility of public records, creating, in effect, separate hearsay exceptions for the following three types of public records: (1) records of the official activities of the office or agency; (2) reports of matters observed pursuant to a legal duty to observe and report, excluding certain observations in criminal cases; (3) in all civil cases, and in criminal cases if offered against the government, actual findings resulting from a legally authorized investigation.[396]

The expansion occasioned by rule 803(8) is initially evident in the introductory language to the rule, which states that "records . . . in any form, of public offices" are within the scope of the rule. This language broadens the existing federal public records exception in three ways. First, the form of the records no longer governs their admissibility, whereas, in the past, only "books or records of account or minutes of proceedings" were accepted.[397] Second, the historical limitation of the exception to only federal records is no longer correct. Paragraph (8) encompasses all public records, whether federal or nonfederal.[398] This expansion obviates the need to resort to the business records exception to obtain admission of the nonfederal public records. Hopefully, the confusion caused by the needless overlap will be resolved.[399] Furthermore, the alleviation of confusion should eliminate the problems of contemporaneity and authentication encountered by substituting the business records exception.[400] The final area of expansion covers the requirement that the public official have personal knowledge of the report. This requirement was imposed at common law,[401] but the prerule decisions held that lack of personal knowledge affected only the evidence's weight and not its admissibility.[402] Although rule 803(8) is silent on the question, commentaries suggest that the rule has no requirement of personal knowledge and looks to an official's knowledge only as an indication of the record's trustworthiness.[403]

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[395] 28 U.S.C. § 1733(a) (1970) provides: "Books or the records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept."

[396] FED. R. EVID. 803(8).

[397] *Compare id. with* 28 U.S.C. § 1733(a) (1970).

[398] *Compare* FED. R. EVID. 803(8), Advisory Comm. Note ("The rule makes no distinction between federal and nonfederal offices and agencies.") *with* Smith v. Spina, 477 F.2d 1140, 1146 (3d Cir. 1973) (Federal Public Records Act inapplicable to nonfederal agencies).

[399] *See, e.g.*, Ellis v. Capps, 500 F.2d 225, 226 n.1 (5th Cir. 1974) (prison records admissible under official records exception because they were compiled in the "regular course of business"); Blanchard v. United States, 360 F.2d 318, 320 (5th Cir. 1966) (public record admitted under Federal Business Records Act). *See also Rules 803(6) and (7). supra.*

[400] *See* 4 WEINSTEIN'S EVIDENCE ¶ 803(8)[01], at 803-173 (1975). For authentication of public records under rule 803(8), see FED. R. EVID. 902(2) & 1005.

[401] C. MCCORMICK, *supra* note 4, § 317, at 376-78.

[402] *E.g.*, United States v. Hudson, 479 F.2d 251, 253 (9th Cir. 1972), *cert. denied,* 414

The first of the three types of records admissible under rule 803(8) is records of the official activities of a public office or agency. There is considerable authority supporting the use of such records,[404] and the decisions have generally dealt only with the substantiation of trustworthiness.[405]

Subpart (B) of rule 803(8) provides for admission of certain public records preserved pursuant to a legal duty to observe and report. Justification for admission of these reports is based on the safeguards provided by the legal duty to investigate fairly and report accurately.[406] It is questionable, however, whether a lack of prejudice exists in all public investigations. Indeed, Congress was so concerned with the animosity that can exist between the police and the criminal defendant that it elected to preclude the use of police investigative reports from operation of this exception in criminal cases.[407] It should be noted, however, that recent interpretations have concluded that the use of police reports is not totally prohibited by rule 803(8). For example, if the report is considered a product of a routine recording function rather than "contemporaneous observation of the crime," the report is admissible.[408] Additionally, if the report qualifies as a rule 803(8)(C) evaluative report, it may be admissible if offered against the government, regardless of the rule 803(8)(B) exclusion.[409]

U.S. 1012 (1973); United States v. Daniels, 429 F.2d 1273, 1274 (6th Cir. 1970); Southern Glass & Builders Supply Co. v. United States, 398 F.2d 109, 110 (5th Cir. 1968).

[403] 4 WEINSTEIN'S EVIDENCE ¶ 803(8)[02], at 803-175 (1975).

[404] *See, e.g.*, Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 129 (1919) (treasury records admissible to prove that payment had not been received); Givens v. Lederle, 556 F.2d 1341, 1346 (5th Cir. 1977) (government documents on polio admitted in suit seeking damages for contraction of polio from Sabin oral vaccine); United States v. Prevatt, 526 F.2d 400, 403 (5th Cir. 1976) (minutes of county board of commissioners admissible to show failure to report bribery income).

[405] *See* United States v. Brown, 548 F.2d 1194, 1205-06 (5th Cir. 1977) (in tax fraud prosecution, IRS agent's testimony that defendant's tax returns contained oversized deductions was not admissible because there was no way to determine trustworthiness); United States v. Miller, 514 F.2d 41, 42-44 (9th Cir. 1975) (use of unauthenticated copies of state court criminal records ruled to be error but not reversible).

[406] *See* United States v. Leal, 509 F.2d 122, 125 (9th Cir. 1975) (official document exception permits introduction of all documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices).

[407] S. REP. NO. 1227, 93d Cong., 1st Sess. 17 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7064.

[408] United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976).

[409] United States v. Smith, 521 F.2d 957, 968 n.24 (D.C. Cir. 1975). For a discussion of evaluative reports, see notes 410 through 414 and accompanying text *infra*.

The final type of official record admissible under the exception is factual findings resulting from a legally authorized investigation. Although admissible in all civil cases, these records can be used in criminal cases only if offered against the government. The drafters of the federal rules felt that such a distinction was necessary to avoid "the almost certain collision with confrontation rights that would result from their use against the accused in a criminal case."[410]

Most of the decisions in the investigative report area have been concerned with the definition of "factual findings" and particularly with whether "evaluative" reports are included.[411] The congressional activity on rule 803(8) indicates a strong difference of opinion between the House and Senate Committees concerning the admissibility of opinions contained in evaluative reports.[412] The drafters of the federal rules suggested that the admission of evaluative reports should be determined on a case-by-case basis, considering such factors as timeliness of the investigation, experience and skill of the investigating officer, existence of prior hearings on the subject, and motive in making the report.[413] A recent decision noted the wisdom and flexibility in the drafters' approach and suggested that it provides the proper course.[414]

Interpretations of rule 803(8) have emphasized that the investigations must be authorized and the factual findings must be a result of the authorized investigation. In separate cases, it was held that the absence of authority to make the investigation[415] and a finding that the factual contents resulted from investigations made subsequent to the authorized inquiry[416] render an evaluative report inadmissible under paragraph (8).

The admissibility of public records is generally governed by statutory directives, and Mississippi is no exception.[417] In addition to the legislative authority, the Mississippi Supreme Court has acknowledged the existence of the public records hearsay exception,[418] and a variety of types of public records have been ruled admissible.[419]

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[410] FED. R. EVID. 803(8), Advisory Comm. Note.

[411] *Id.; see, e.g.,* Hodge v. Seiler, 558 F.2d 284, 288-89 (5th Cir. 1977) (HUD investigative report admissible under rule 803(8)). *See also* McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?,* 42 IOWA L. REV. 363 (1957).

[412] *Compare* H.R. REP. No. 650, 93d Cong., 1st Sess. 14 (1973) ("The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule."), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7064 *with* S. REP. No. 1227, 93d Cong., 1st Sess. 18 (1973) ("The committee takes strong exception to this limited understanding of the application of the rule.").

[413] FED. R. EVID. 803(8), Advisory Comm. Note.

[414] *See In re* American Export Lines, Inc., 73 F.R.D. 454, 456-59 (S.D.N.Y. 1977) (facts contained in Coast Guard report were admitted but evaluative conclusions and opinions in the same report were excluded).

[415] United States v. American Cyanamid Co., 427 F. Supp. 859, 867 (S.D.N.Y. 1977).

[416] United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976).

[417] *See* MISS. CODE ANN. §§ 31-1-83 to -111 (1972).

Although the exception has been judicially recognized, no Mississippi decision has delineated any specific requirements of admissibility. A Fifth Circuit decision, however, suggested the following requirements: (1) the information must be entered in an official public record; (2) the entry must be made in proper time; and (3) the entry must be made by someone with a legal duty to do so.[420] But since the court was not dealing with Mississippi law, there is no assurance that these guidelines will be followed.

Two problem areas in the development of the public records exception have been addressed by the Mississippi judiciary. *Newman v. Dow*[421] is an old decision dealing with the requirement of personal knowledge on the part of the official. Although the *Newman* court required cognizance on the part of the officer,[422] the decision's age and its vague language leave the issue murky. To the issue of evaluative reports containing statements of opinion, a more definitive treatment has been granted. As a general rule, the Mississippi Supreme Court has pointed out that "[r]ecords which reflect 'causes and effects . . . discretion, expressions of opinions or . . . conclusions' do not [qualify for the public records exception]."[423] This exclusion has been carried over into the specific area of accident reports. Although there is a statute requiring that accident reports be made,[424] other legislative[425] and judicial[426] directives prohibit their use as substantive evidence. There is, however, authority allowing them to be admitted for impeachment purposes.[427]

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[418] *See* Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co., 317 So. 2d 47, 49 (Miss. 1975). "As a general rule public records are admissible (as an exception to the hearsay rule) to prove 'routine matters' without requiring public officials to appear in court." *Id.*

[419] *See, e.g.,* Stokes v. Newell, 174 Miss. 629, 639, 165 So. 542, 544 (1936) (school board minutes); De Lashment v. McClelland, 152 Miss. 781, 790-91, 118 So. 904, 906 (1928) (United States Land Office records); Albrecht v. State, 62 Miss. 516, 523 (1885) (sheriff's liquor license book). *But see* Blount v. Houston Coca Cola Bottling Co., 184 Miss. 69, 74, 185 So. 241, 242 (1939) (state chemist's certificate inadmissible).

[420] Gilmore v. United States, 93 F.2d 774, 775 (5th Cir.), *cert. denied,* 304 U.S. 569 (1938).

[421] 5 Miss. (4 Howard) 522 (1840).

[422] *Id.* at 564.

[423] Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co., 317 So. 2d 47, 49 (Miss. 1975). *See also* Kelly v. State, 278 So. 2d 400, 402 (Miss. 1973) (one officer's reading of police report prepared by another officer constituted reversible error).

[424] Miss. Code Ann. § 63-3-411 (Supp. 1977).

[425] *See id.* § 63-3-417 (1972) (establishes confidentiality of accident reports).

[426] *See* Hall v. Boykin, 207 So. 2d 645, 646-47 (Miss. 1968) (admission of highway patrolman's accident report found to constitute reversible error).

Rule 803(9). Records of Vital Statistics[428]

A derivative of the public records exception is the record of vital statistics exception. Both are justified by a similar necessity and trustworthiness rationale: the need to guard public officials from burdensome judicial appearances and the accuracy ensured by official duties and public inspections.[429] Because they are found to have these qualities, several types of records are within the ambit of the vital statistics exception, including birth certificates,[430] death certificates,[431] and marriage licenses.[432]

The vital statistics exception deviates from the public records exception in one respect; there is no requirement that the out-of-court declarant have an "official" duty to report. Under the common law exception for records of vital statistics, the official duty criterion was replaced with a requirement that the report be made pursuant to a

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[427] *See* Boyd v. Donald, 250 Miss. 618, 623-24, 167 So. 2d 661, 663 (1964) (highway patrolman's report admissible to impeach officer's trial testimony).

[428] Fed. R. Evid. 803(9) provides: "Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages [are admissible despite the declarant's availability], if the report thereof was made to a public office pursuant to requirements of law." See Evidence 🔑 333-37. It should be noted at the outset that rule 803(9) deals with vital statistics once they have been made public records. If the record has not been publicly filed, the hearsay exceptions covered by rule 803(11) should be examined.

[429] *See* Charleston Nat'l Bank v. Hennessy, 404 F.2d 539, 541 (5th Cir. 1968) (death certificate trustworthy because made pursuant to official duty and subject to public inspection).

[430] *See, e.g.,* Woodward v. United States, 185 F.2d 134, 137 (8th Cir. 1950) (birth records which included statements indicating paternity admissible), *rev'd per curiam on other grounds,* 341 U.S. 112 (1951); United States v. Austrew, 202 F. Supp. 816, 822 (D. Md. 1962) (birth certificate admissible to establish age in Mann Act prosecution), *aff'd per curiam,* 317 F.2d 926 (4th Cir. 1963); Williams v. Butterfield, 145 F. Supp. 567, 568 (E.D. Mich. 1956) (birth certificate admissible in administrative deportation hearing), *aff'd per curiam sub nom.* Williams v. Mulcahey, 250 F.2d 127, 128 (6th Cir. 1957), *cert. denied,* 356 U.S. 946 (1958).

[431] *See, e.g.,* Shell v. Parrish, 448 F.2d 528, 531 (6th Cir. 1971) (death certificate stating how accident occurred admissible as prima facie evidence of its contents); Marker v. Prudential Ins. Co. of America, 273 F.2d 258, 262-64 (5th Cir. 1959) (death certificates admissible as prima facie evidence of their contents, subject to full explanation and contradiction); Weiner v. Metropolitan Life Ins. Co., 416 F. Supp. 551, 558-59 (E.D. Pa. 1976) (death certificate listing cause of death prima facie evidence of its contents under Fed. R. Evid. 803(9)).

[432] *See, e.g.,* Williams v. Butterfield, 145 F. Supp. 567, 568 (E.D. Mich. 1956) (marriage license admissible in administrative deportation hearing), *aff'd per curiam sub nom.* Williams v. Mulcahey, 250 F.2d 127, 128 (6th Cir. 1957), *cert. denied,* 356 U.S. 946 (1958).

"professional" duty.[433] This enabled records made by professionals such as ministers and physicians to be covered by the exception. Rule 803(9), however, abandons both requirements and imposes no mandate of duty.

The requirement of personal knowledge of the official was an area of concern under the public records exception;[434] it is also a troublesome area of the vital statistics exception. Many records of vital statistics contain conclusory statements of which the recorder has no personal cognizance, for example, a death certificate reciting the cause of death as suicide. Although the drafters' commentary on rule 803 indicates that firsthand knowledge is required,[435] imposition of this requirement has been attacked as counter to the rule's main purpose.[436] The Fifth Circuit capsuled the antagonism toward the requirement when it stated, "There cannot be imposed an unrealistically strict requirement of personal knowledge by the certifying officer, for the practical advantages of records of birth, marriage, divorce, and official registrations would be destroyed."[437] Most decisions on the exception agree with this position, holding that conclusory statements within statistical records are admissible as prima facie evidence of a wide range of subjects. For example, a death certificate is admissible to show not only the cause of death,[438] but also to establish the date of death and the commencement date of the death-causing illness.[439] In judging a record's admissibility, an obvious error on the record's face will affect only its weight and not its admissibility.[440] But the court must be satisfied that the evidence's prejudicial qualities will not outweigh its probative value.[441]

A final area that should be mentioned is the authentication of vital statistics records. For a record to qualify under paragraph (9), it must first be properly authenticated. This requirement should pose no significant problem because rules 902(4) and 1005[442] provide liberal authentication provisions for public records.

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[433] C. McCormick, *supra* note 4, § 316, at 736.

[434] *See* notes 401 through 403 and accompanying text *supra*.

[435] Fed. R. Evid. 803, Advisory Comm. Notes.

[436] *See* 5 J. Wigmore, *supra* note 4, § 1646, at 591 (knowledge should not be a requirement because "[a] main purpose of the system would be defeated if the records were not liberally available in litigation").

[437] Charleston Nat'l Bank v. Hennessy, 404 F.2d 539, 541 (5th Cir. 1968).

[438] *E.g.*, Shell v. Parrish, 448 F.2d 528, 531 (6th Cir. 1971); Marker v. Prudential Ins. Co. of America, 273 F.2d 258, 262-64 (5th Cir. 1959); Weiner v. Metropolitan Life Ins. Co., 416 F. Supp. 551, 558-59 (E.D. Pa. 1976).

[439] Meth v. United Life Ins. Co., 198 F.2d 446, 448-49 (3d Cir. 1952) (admissible, but not conclusive evidence of commencement date of illness).

[440] United States v. Austrew, 202 F. Supp. 816, 822 (D. Md. 1962), *aff'd per curiam*, 317 F.2d 926 (4th Cir. 1963).

[441] *See, e.g.*, Charleston Nat'l Bank v. Hennessy, 404 F.2d 539, 541 (5th Cir. 1968) (death certificate inadmissible because trial judge found it would be more prejudicial than probative).

Mississippi's adoption of the vital statistics hearsay exception is codified in two statutes. Section 41-57-9 of the Mississippi Code admits records of birth, sickness, and death when the records are "properly certified to by the state registrar of vital statistics, to be a true copy thereof."[443] Section 41-57-47, providing similar treatment for records of marriages, states that "[a]ny copy of the records of marriages, when properly certified to by the state registrar of vital statistics, to be a true copy thereof, shall be taken and received as prima facie evidence of the facts therein stated in all courts of this state."[444] Subsequent cases have upheld the general operation of these statutes,[445] but extension of the statutory scope to other types of statistics, such as age, appears to be prohibited.[446]

Rule 803(10). Absence of Public Record or Entry[447]

Since official duties are imposed to maintain the accuracy and completeness of public records covered by rules 803(8) and (9), rule 803(10) provides that a certificate stating that no public record can be found is exempted from the general hearsay exclusion.[448] Rule 803(10) encompasses two basic concerns: first, proper authentication of the record's absence, and second, proper use of the certificate which establishes the absence.

Proper authentication of the record's absence involves two steps: showing that a diligent search failed to disclose the record and presenting an official certification of the search and absence. Under the rule's requirement of diligent search, which provides assurance that the record does not exist, the investigation must be more than a "casual or partial search."[449] The specific amount of inquiry required has not been definitively established. Therefore, the general considerations of trustworthiness should govern.[450] The proper confirmation of the search and absence is merely a question of proving the certificate's authenticity. An official statement must be prepared, stating that a diligent search was conducted and that no record was found. The certificate must then be signed by the official conducting the search and a seal of the official's office placed on the certificate.[451] Nonetheless, the certificate's failure to state that the search was diligent does not bar its admission.[452] Furthermore, parol evidence of the record's absence may be used in lieu of an official certificate.[453]

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[442] Fed. R. Evid. 902(4) (self-authentication of certified copies of public records); *id.* 1005 (authentication of public records).

[443] Miss. Code Ann. § 41-57-9 (1972).

[444] *Id.* § 41-57-47.

[445] *See, e.g.,* Life & Cas. Ins. Co. v. Walters, 180 Miss. 384, 394, 177 So. 47, 49-50 (1937) (records of vital statistics are admissible and are excepted from any rules regarding the privileged communication they may contain).

[446] *See* Clegg v. Johnson, 164 Miss. 198, 207-08, 143 So. 848, 850-51 (1932) (separate statistics of age not included under statutory language).

[447] Fed. R. Evid. 803(10) provides:

> Absence of public record for entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry [is admissible despite the declarant's availability].

See Criminal Law 🔑 429, 436, 662; Evidence 🔑 333-49.

[448] *See* United States v. Harris, 551 F.2d 621, 622 (5th Cir. 1977) (substantial need for and trustworthiness of certificates). *See generally* Fed. R. Evid. 803(10), Advisory Comm. Note.

Once the certificate is authenticated, it is prima facie evidence that no record exists.[454] Additionally, it is prima facie evidence of the nonoccurrence of a normally recorded event, because a showing that the record does not exist indicates that the event did not occur.[455] In both situations, however, the record is merely prima facie proof and is therefore subject to rebuttal.

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[449] United States v. Robinson, 544 F.2d 110, 115 (2d Cir. 1976).

[450] *Id.* at 114-15. *See also* Fed. R. Evid. 403 (exclusion of evidence whose prejudicial effect outweighs its probative value).

[451] Fed. R. Evid. 902 (authentication); *see* United States v. City of McAlester, 410 F. Supp. 848, 853-54 (E.D. Okla. 1976) (discusses authentication use of rule 902 for 803(10) certificates). *See also* Fed. R. Civ. P. 44(b) (proof of lack of public record in civil cases); Fed. R. Crim. P. 27 (proof of lack of public record in criminal cases).

[452] United States v. Harris, 551 F.2d 621, 621-22 (5th Cir. 1977).

[453] *See* United States v. Jewett, 438 F.2d 495, 497-98 (8th Cir.) (in title dispute over Indian lands, parol evidence was admissible to show that no record of title divestiture appeared), *cert. denied,* 402 U.S. 947 (1971); Jackson v. United States, 250 F.2d 897, 900-01 (5th Cir. 1958) ("To establish the fact that there is no record as to a particular matter or thing parol evidence may be given.").

[454] *See, e.g.,* United States v. Thompson, 420 F.2d 536, 545 (3d Cir. 1970) (affidavit of custodial officer that record does not exist admissible to show absence of the record); Smith v. United States, 353 F.2d 838, 844 (D.C. Cir. 1965) (deputy police chief's certificate that no gun license was filed in defendant's name admitted to prove that defendant had no license), *cert. denied,* 384 U.S. 974 (1966); Jackson v. United States, 250 F.2d 897, 900-01 (5th Cir. 1958) ("certificate of a custodian of an official record is admissible to prove lack of a particular record").

[455] *See, e.g.,* United States v. Mix, 446 F.2d 615, 621-23 (5th Cir. 1971) (IRS certificate stating that a diligent search showed no record of defendant's firearm registration admissible to show that firearm was not registered); United States v. City of McAlester, 410 F. Supp. 848, 853-54 (E.D. Okla. 1976) (certificate of National Archives Director that no correspondence had been filed with regard to easement admissible to prove that there was no correspondence).

Mississippi has adopted the absence of public record exception in section 13-1-83 of the Mississippi Code, which provides:

> A certificate, under his hand and official seal, by the officer to whom the legal custody of a record or paper belongs, that he has made diligent search in his office for the record or paper, and that it cannot be found therein, shall be admissible in evidence, and have the same effect as if the officer personally testified to the fact stated in such certificate.[456]

This statute appears to cover all public records, subject to the same basic requirements of rule 803(10), although there has been no case establishing the parameters of the statute.[457]

Rules 803(11) and (12). Records of Religious Organizations and Marriage, Baptismal, and Similar Certificates[458]

Rule 803(9) establishes an exception for records of special personal events that are publicly maintained. Similarly, rules 803(11) and 803(12) create hearsay exceptions for records maintained by religious organizations and, under certain circumstances, records maintained by any custodian. The records covered include, among others, statements of birth, death, baptism, and marriage. These exceptions have been grouped together because they result from a similar rationale of trustworthiness: the belief that false information would not be furnished on such occasions.[459]

Rule 803(11) allows admission of regularly kept records of religious organizations to prove facts of special personal or family history. Although some early cases held otherwise,[460] church records have traditionally been admissible only as business records, and their use was limited to proof of church activity.[461] Thus, the occurrence of a religious event, for example, a baptism, could be proved, but any information in the record that did not pertain to the actual ceremony, for example, the age of a baptized child, was inadmissible.[462] Rule 803(11) drops this limitation and allows any information contained in the record to be admitted. The rule does not define religious organization. Although this will generally present no problem, the records of some of today's more unconventional religious groups may be found lacking in trustworthiness.[463]

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[456] MISS. CODE ANN. § 13-1-83 (1972).

[457] Perhaps it would be appropriate to attach a certificate from the State Law Library indicating that, indeed, no such case exists.

[458] FED. R. EVID. 803(11) provides: "Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization [are admissible despite the declarant's availability]."

Id. 803(12) provides:

> Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter [are admissible despite the declarant's availability].

See Evidence 🔑 285-97.

[459] FED. R. EVID. 803(11), Advisory Comm. Note.

[460] *See, e.g.,* Lewis v. Marshall, 30 U.S. (5 Pet.) 470, 475-76 (1831) (entries in church

Rule 803(12) provides for admission of certificates of marriage and the like held by any custodian if they were prepared under proper legal or religious authorization. Underlying this extension is the rationale that, since similar public records[464] and religious records[465] are admissible, certificates held by other custodians should also be admitted once sufficient guarantees of accuracy are imposed.

Because they contained shallow analyses of the substantive problems related to the admission of religious records of ceremonial certificate evidence, the early federal cases appear to have little bearing on the development of rule 803(12).[466] This rule requires that the certificate be made by someone with a legal or religious authority to perform the act and that the certificate be issued within a reasonable time of the event's occurrence. If the certificate has been publicly filed, it is self-authenticating under rule 902.[467] If, however, there has been no public filing, preliminary evidence of the authorization must be presented.[468] Once authorization is established, the requirement of issuance within a reasonable time is supplied by the certificate itself. There is no requirement of personal knowledge on the part of the issuer.[469]

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register of burial admitted to prove deaths). *See generally* Annot., 36 A.L.R. 689 (1925).

[461] *See* Blackburn v. Crawford's Lessee, 70 U.S. (3 Wall.) 175, 189 (1866) (baptismal certificate admissible as business record). *See generally* 4 WEINSTEIN'S EVIDENCE ¶ 803(11)[01], at 803-195 to -196 (1975).

[462] FED. R. EVID. 803(11), Advisory Comm. Note.

[463] *See* 4 WEINSTEIN'S EVIDENCE ¶ 803(11)[01], at 803-196 (1975).

[464] See notes 466 through 471 and accompanying text *supra.*

[465] See notes 460 through 462 and accompanying text *supra.*

[466] *Compare* Scott v. McGrath, 104 F. Supp. 267, 271 (E.D.N.Y. 1952) (in immigration proceeding, baptismal certificate ruled admissible for whatever value it may have) *with* Martinez v. Ribicoff, 200 F. Supp. 191, 192 (D.P.R. 1961) (in social security proceeding, baptismal certificate ruled inadmissible because not a public document and not signed by the parent) *and* United States v. Bukis, 17 F. Supp. 77, 78 (E.D. Pa. 1936) (in immigration proceeding, foreign church's baptismal certificate ruled inadmissible to prove date, place of birth, or names of parents).

[467] FED. R. EVID. 902.

[468] *Id.* 803(12), Advisory Comm. Note.

[469] *Id.*

Mississippi has adopted the records of religious organization and ceremonial certificate hearsay exceptions in a limited form. Section 13-1-103 of the Mississippi Code provides:

> A certificate of marriage, signed and transmitted to the circuit clerk of the proper county by the person, officer or clerk of the religious society celebrating the same, and copies of such certificate or of the record thereof, under the hand and official seal of the clerk in whose office such certificate or record is kept, shall be admitted in evidence.[470]

Although this statute allows broad use of marriage certificates, no authority was found allowing the admission of nonpublic certificates, such as baptism, divorce, or death.[471]

Rule 803(13). Family Records[472]

Rule 803(13) creates a hearsay exception for statements of family history that are part of family-kept Bibles, genealogies, tombstones, and the like. These statements are believed trustworthy because their existence and use subject them to the type of scrutiny that would not allow inaccuracies to stand uncorrected.[473]

The family records exception was recognized by many prerule cases,[474] but the admissibility requirements under these cases were more strict than those mandated by rule 803(13). For example, early decisions held that the record was only admissible if its maker were unavailable.[475] Under rule 803(13), this is no longer a requirement.[476] Rule 803(13) further deviates from the common law by abolishing the requirement that the record be made by a family member,[477] which will be recognized as a boon by attorneys who have battled the troublesome authentication problems encountered under this exception.[478]

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[470] MISS. CODE ANN. § 13-1-103 (1972).

[471] For Mississippi's admissions of public records, see notes 420 through 427 and accompanying text *supra*.

[472] FED. R. EVID. 803(13) provides: "Family Records. Statements of fact concerning personal or family history contained in family-kept Bibles, genealogies, charts, engravings on rings, inscription on family portraits, engravings on urns, crypts, or tombstones, or the like [are admissible despite the declarant's availability]." See Evidence 🔑 161(1), 288, 291, 293, 297, 301.

[473] 11 MOORE'S FEDERAL PRACTICE § 803(13)[4], at VIII-162 (1976).

[474] *See, e.g.,* Lewis v. Marshall, 30 U.S. (5 Pet.) 470, 476 (1831) (inscription in family-kept Bible admissible to prove when ancestor died); Miami County Nat'l Bank v. Bancroft, 121 F.2d 921, 924 (10th Cir. 1941) (family genealogies admissible to establish heirship); United States v. Mid-Continent Petroleum Corp., 67 F.2d 37, 44-45 (10th Cir. 1933) (tribal Indian rolls admissible to show family genealogy). *See generally* Annot., 29 A.L.R. 372 (1924).

[475] *E.g.,* Miami County Nat'l Bank v. Bancroft, 121 F.2d 921, 924 (10th Cir. 1941); *see* Comment, *Admissibility of Hearsay Evidence on Matter of Family History,* 5 ARK. L. REV. 58, 59 (1951). "The first condition required by a majority of courts is that the declarant must be shown to be dead. Some jurisdictions either by statute or judicial decision have relaxed this condition to the mere unavailability of the declarant." *Id.*

[476] See note 175 and accompanying text *supra*.

Mississippi has adopted a segment of the family records exception, approving admission of information contained in a family Bible. In *Tisdale v. Jefferson Standard Life Insurance Co.,*[479] the plaintiff tried to establish his age by referring to his family-kept Bible, which was not produced at trial. The trial court initially allowed the testimony, but subsequently sustained an objection to the testimony and instructed the jury to disregard it. According to the Mississippi Supreme Court, however, the damage had already been done.[480] The court held that in order to admit evidence of the Bible's contents, the Bible must be produced and authenticated, or proof offered to show that the Bible was lost or destroyed.[481] Although this decision is authority for a family records hearsay exception in Mississippi, the extent of its applicability to other forms of family records is uncertain. The application of the exception to other similar records should be determined in each case by their reliability and trustworthiness.[482]

Rules 803(14) and (15). Records of and Statements in Documents Affecting an Interest in Property[483]

Rules 803(14) and (15) establish hearsay exceptions for records of documents affecting an interest in property and statements contained in the documents. The exceptions are based on the necessity rationale that litigation involving the documents will frequently occur many years after the transaction, at a time when the parties are unavailable or have forgotten the circumstances surrounding it.[484] There are also numerous indicia of trustworthiness related to the exceptions, including the following: the circumstances in which dispositive instruments are made and the financial interest at stake promote reliability; the fact that the recital is in writing eliminates the danger of inaccuracy of transmission; since the statement must be germane to the purpose of the document, a protest would be expected about an untrue proposition intrinsic to the transaction; the exception does not apply if dealings with the property have been inconsistent with the tenor of the document.[485]

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[477] 11 MOORE'S FEDERAL PRACTICE § 803(13)[4], at VIII-162 (1976).

[478] 4 WEINSTEIN'S EVIDENCE ¶ 803(13)[01], at 803-199 (1975).

[479] 244 Miss. 839, 147 So. 2d 122 (1962).

[480] *Id.* at 846-47, 147 So. 2d at 125.

[481] *Id.* at 846, 147 So. 2d at 125.

[482] For a generalized discussion of the Mississippi pedigree hearsay exception, which overlaps into this area, see notes 581 through 584 and accompanying text *infra.*

[483] FED. R. EVID. 803(14) provides:

> Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed [is admissible despite the declarant's availability], if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Id. 803(15) provides:

> Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property [is admissible despite the declarant's availability] if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

See Evidence 🔑 342.

The application of paragraph (14), dealing with records affecting property, is confusing because these records appear to come within the rule 803(8) public records exception.[486] The drafters of the federal rules addressed this problem by stating:

> Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered.[487]

In summary, rule 803(14) should be used to prove a document's execution and delivery when the recording official has no knowledge of the execution or delivery.

Rule 803(14) states that the record is admissible only if "an applicable statute authorizes the recording of documents of that kind in that office."[488] Thus, the status of local law is one of the key considerations in the use of the rule. Although paragraph (14) is silent on what the controlling law should be, there is authority that the issue of recording is to be determined by using state rather than federal law.[489] Presumably, an exception to this rule would be made where records of the United States Land Office are involved.[490]

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[484] 4 WEINSTEIN'S EVIDENCE ¶ 803(15)[01], at 803-203 (1975).

[485] *Id.*

[486] FED. R. EVID. 803(8).

[487] *Id.* 803(14), Advisory Comm. Note. For a discussion of firsthand knowledge under the public records exception, see notes 401 through 403 and accompanying text *supra.*

[488] FED. R. EVID. 803(14). For recording requirements under Mississippi law, see MISS. CODE ANN. §§ 75-9-401 to -406 (Supp. 1977) (recordings relating to security interests in personalty); *id.* § 89-5-1 (1972) (recording requirements for conveyances of land); *id.* § 89-5-7 (recording requirement for written contracts relating to land).

[489] *Compare* Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939) (deed recorded

Whereas paragraph (14) deals with proof of a properly recorded document's contents, execution, or delivery, rule 803(15) provides for admission of fact statements contained in property related documents, regardless of whether they have been recorded.[491] Their admission, however, is contingent on a showing that two guarantees of trustworthiness are met. First, it must be shown that "the matter stated was relevant to the purpose of the document";[492] second, there must be proof that "dealings with the property since the document was made have been [consistent] with the truth of the statement or the purport of the document."[493]

The correct use of paragraph (15), like paragraph (14), is somewhat confusing. The drafters suggest that a proper use of the exception would be to prove the existence of a power of attorney which is purported to be the basis of the document's execution.[494] Although no decision could be found using this exception, its scope appears broad enough to include a variety of documents that affect realty or personalty interests, including contracts, wills, mortgages, deeds, and leases.[495]

Although there are Mississippi cases recognizing the admissibility of records relating to property interest transactions,[496] the documents were not admitted to prove execution or delivery[497] and were admitted only if they had been recorded.[498] Thus, it would appear that Mississippi has not adopted the exceptions covered by rules 803(14) and 803(15).

Rule 803(16). Statements in Ancient Documents[499]

Rule 803(16) allows admission of statements contained in docu-

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under state law is a "substantial right upon which the holder of recorded legal title . . . may confidently rely") *with* Erie R.R. v. Tompkins, 304 U.S. 64, 71-73 (1938) (federal court should apply state substantive law in diversity cases). *See generally* FED. R. EVID. 803(14), Advisory Comm. Note.

[490] *See, e.g.*, Culver v. Uthe, 133 U.S. 655, 657-58 (1890) (United States Land Office records admitted to establish patent); Galt v. Gallaway, 29 U.S. (4 Pet.) 332, 343 (1830) (United States Land Office records admissible "as evidence of the facts stated").

[491] 11 MOORE'S FEDERAL PRACTICE § 803(15)[3], VIII-168 (1976).

[492] FED. R. EVID. 803(15).

[493] *Id.*

[494] *Id.*, Advisory Comm. Note.

[495] *See* 11 MOORE'S FEDERAL PRACTICE § 803(15)[3], at VIII-168 (1976).

[496] *See, e.g.*, De Lashmet v. McClellan, 152 Miss. 781, 790-91, 118 So. 904, 906 (1928) (certified copy of United States Land Office records admissible to prove facts contained therein); Doe v. Parker, 11 Miss. (1 S. & M.) 114, 118 (1844) (certificate of land admissible as evidence of title); Doe v. McCaleb, 3 Miss. (2 Howard) 756, 766-67 (1838) (certificate of general land office admissible).

[497] *See* cases cited in note 496 *supra*.

[498] *See id.*

[499] FED. R. EVID. 803(16) provides: "Statements in ancient documents. Statements in

ments that are shown to have existed over twenty years and are properly authenticated. This exception from the general hearsay exclusion is justified primarily on the grounds of necessity. The Fifth Circuit recognized this justification, stating, "[A]fter a long lapse of time, ordinary evidence regarding signatures or handwriting is virtually unavailable, and it is therefore permissible to resort to circumstantial evidence."[500]

The indicia of trustworthiness, however, have caused many commentators to question the value of the exception. Their discontent stems from the belief that lying is not a modern phenomenon and that a mere lapse of time offers little assurance of truthfulness.[501] In response to these charges, advocates of the exception have emphasized the following assurances of reliability: (1) "the dangers of mistransmissions are minimized since the rule applies only to written statements";[502] (2) "[t]he recitals are clearly more reliable than would be the declarant's oral testimony based on his memory of what happened thirty [or twenty] years ago";[503] (3) "[t]he age requirement assures that in most cases the document will predate the present controversy";[504] (4) "[t]he authenticity requirements give the courts great discretion in excluding documents that show signs of inaccuracy."[505] The drafters felt that these

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a document in existence twenty years or more the authenticity of which is established [are admissible despite the declarant's availability]." See Evidence 🔑 372.

[500] Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396 (5th Cir. 1961); *see* C. McCormick, *supra* note 4, § 323, at 747 ("After passage of such a period of time, witnesses are unlikely to be available or, if available, to recall reliably the events at issue."); 46 Iowa L. Rev. 448, 453 (1961) (usual dearth of other evidence creates "a great need for such evidence").

[501] *See, e.g.*, C. McCormick, *supra* note 4, § 323, at 747 ("it is unlikely that lying was less common thirty years ago"); Comment, *State Taxation of Foreign Corporations Engaged in Interstate Commerce*, 33 Yale L.J. 412, 417 (1924) ("The mere lapse of time does not afford any guarantee of veracity. . . . A statement untrue when it was made is untrue after a lapse of thirty years").

[502] C. McCormick, *supra* note 4, § 323, at 747.

[503] 46 Iowa L. Rev. 448, 452 (1961). Prior to the adoption of the federal rules, the existence requirement was generally considered to be 30 rather than 20 years. *See, e.g.*, Lee Pong Tai v. Acheson, 104 F. Supp. 503, 505-06 (E.D. Pa. 1952) (ancient documents hearsay exception inapplicable to an affidavit of birth because document was only 26 years old).

[504] 11 Moore's Federal Practice § 803(16)[4], at VIII-172 (1976); *accord*, Wickes, *Ancient Documents and Hearsay*, 8 Tex. L. Rev. 451, 472 (1930) (the age of the document "serves effectively to negative the idea that the recital was made with a view to creating evidence for use" in the present controversy).

[505] *See, e.g.*, *In re* Estate of Hall, 328 F. Supp. 1305, 1311-12 (D.D.C.) (38 year old will found to be inadmissible because appearance was suspicious), *aff'd per curiam*, 466 F.2d 340 (D.C. Cir. 1972); Steward Oil Co. v. Sohio Petroleum Co., 202 F. Supp. 952, 957-58 (E.D. Ill. 1962) (photostatic copy of notice of acceptance of coal rights, executed 54 years earlier but recorded 40 years after execution, not admissible because oral testimony established question of authenticity), *aff'd*, 315 F.2d 759 (7th Cir.), *cert. denied*, 375 U.S. 828 (1963).

elements of reliability, coupled with necessity, warranted a recognition of the exception.[506]

A condition precedent to the use of paragraph (16) is that the document be authenticated. Rule 901(b)(8)[507] indicates that evidence is authenticated as an ancient document if it is in such condition as to create no suspicion concerning its authenticity, if it were in a place where it, if authentic, would likely be, and if it has been in existence twenty years or more at the time it is offered.[508] Because authentication is such an integral part of the exception, many authorities have failed to distinguish the ancient documents hearsay exception from the ancient documents authentication presumption.[509] The distinction between the two is that the ancient documents authentication presumption only provides a basis for the document's authenticity; it does not establish admissibility. The document must still be identified and proved relevant before it is admissible. The ancient documents hearsay exception does not provide a presumption of authenticity. To the contrary, it provides for admissibility of documents that are already authenticated.[510]

The confusion between the authenticity and admissibility aspects of ancient documents has resulted in a parallel conflict over the type of documents covered by the hearsay exception. Because the ancient documents authenticity presumption was traditionally limited to documents involving a transfer of property interest, some courts impose a similar restriction on the ancient documents hearsay exception.[511] This restriction, however, is definitely inapplicable to rule 803(16).[512]

A final question under the federal rules' version of the ancient documents hearsay exception concerns the requirement of personal knowledge on the part of the document's declarant. Despite criticism that this requirement is unreasonably burdensome and results in the exclusion of relevant evidence,[513] the opening commentary to rule 803 indicates that the condition applies to all declarants.[514] Judge Weinstein has suggested that the conflict can be resolved by "requiring a showing from the circumstances that declarant could have had the requisite knowledge."[515]

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[506] FED. R. EVID. 803(16), Advisory Comm. Note.

[507] FED. R. EVID. 901(b)(8).

[508] *Id.*

[509] *See, e.g.,* Town of Ninety-Six v. Southern Ry., 267 F.2d 579, 583 (4th Cir. 1959) (questions existence of the ancient document hearsay exception because ancient document rule is a rule of authentication not admissibility).

[510] *See* C. MCCORMICK, *supra* note 4, § 323, at 747.

[511] *See, e.g.,* Town of Ninety-Six v. Southern Ry., 267 F.2d 579, 583 (4th Cir. 1959) (recorded letter dated over 80 years earlier inadmissible under ancient document hearsay exception because that exception is limited to documents relating to property transfers). *See also* United States v. Fullard-Leo, 66 F. Supp. 782, 785 (D. Haw. 1944) (ancient deeds admissible as evidence of possession of the land by the present owner), *aff'd,* 156 F.2d 756 (9th Cir. 1946), *aff'd,* 331 U.S. 256 (1947).

[512] *See, e.g.,* Bell v. Combined Registry Co., 397 F. Supp. 1241, 1246-48 (N.D. Ill. 1975) (newspaper articles and letters which were over 20 years old admissible under rule 803(16) to prove truth of their contents), *aff'd,* 536 F.2d 164 (7th Cir.), *cert. denied,* 429 U.S. 1001 (1976); FED. R. EVID. 803(16), Advisory Comm. Note (the rule is applicable to "letters, records, contracts, maps, and certificates, in addition to title documents"). *See also* Annot., 46 A.L.R.2d 1318 (1956); Annot., 6 A.L.R. 1437 (1920).

A commentary on Mississippi evidence, reporting Mississippi's adoption of the exception, concludes that case law imposes the following requirements of admissibility: (1) the ancient document or writing must be shown to be at least thirty years old;[516] (2) it must be proved that the ancient document has been in existence for thirty years by proof of its possession by the party claiming under it from that period, by circumstances creating the presumption of such existence and execution, or by proof that the possession of the property in controversy has been held by the parties for the period of thirty years or more;[517] and (3) the ancient document must be free from alteration or other indicia of fraud.[518] Since no Mississippi decision dealing with the exception subsequent to the commentary's publication was found, it may be viewed as current analysis. It should be noted that, despite its recognition that "ancient documents . . . are competent to prove the assertions of fact therein made,"[519] the Mississippi Supreme Court does not explicitly refer to this proposition as a hearsay exception. Nonetheless, this may be implied from the cited decisions.

Rule 803(17). Market reports, Commercial Publications[520]

Rule 803(17) provides for the admission of published compilations that are "generally used and relied upon by the public or by persons in particular occupations." The drafters of the federal rules explained their

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[513] Wickes, *supra* note 504, at 473.

[514] FED. R. EVID. 803, Advisory Comm. Notes.

[515] 4 WEINSTEIN'S EVIDENCE ¶ 803(16)[01], at 803-207 (1975).

[516] T. MCELROY, MISSISSIPPI EVIDENCE § 55, at 243 (1955); *see, e.g.*, Burkley v. Jefferson County, 213 Miss. 836, 845, 58 So. 2d 22, 25 (1952) (title records which were over seventy years old admitted as ancient documents).

[517] T. MCELROY, *supra* note 516, § 55, at 243; *accord*, Fairley v. Fairley, 38 Miss. 280, 290 (1859).

[518] T. MCELROY, *supra* note 516, § 55, at 243; *see* White v. Inman, 212 Miss. 237, 252-53, 54 So. 2d 375, 380 (1951) (wills authenticated and admitted as ancient documents only if there is no "suspicion as to the trustworthiness of the instrument").

[519] Burkley v. Jefferson County, 213 Miss. 836, 845, 58 So. 2d 22, 25 (1952).

[520] FED. R. EVID. 803(17) provides: "Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations [are admissible despite the declarant's availability]." See Evidence 🔑 318(6), 323, 360-61, 364, 381.

inclusion of this exception by stating that the "general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate" gives these documents a high degree of reliability.[521] Urgency is a further impetus for recognizing the exception, "since the task of finding and summoning every person who had a hand in making the report or list would be almost impossible."[522]

The hearsay exception codified by rule 803(17) is not a product of recent origin. The exception was recognized in 1915 by the United States Supreme Court when it stated, "It is unquestioned that, in proving the fact of market value, accredited price-current lists and market reports, including those published in trade journals or newspapers which are accepted as trustworthy, are admissible in evidence."[523] Since its inception, the market reports exception has been expanded to include a variety of publications, including actuarial tables,[524] stock market quotations,[525] safety and repair manuals,[526] pricing indices,[527] city directories,[528] and even public opinion polls.[529] The variety of publications and their individualized problems require an extensive categorial treatment that is beyond the scope of this Article.[530]

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[521] FED. R. EVID. 803(17), Advisory Comm. Note; *see* Note, *Commercial Lists,* 46 IOWA L. REV. 455, 455 (1961) (lists are made accurate because if they are erroneous, the public will stop using them).

[522] Note, *supra* note 521, at 455.

[523] Virginia v. West Virginia, 238 U.S. 202, 212 (1915).

[524] *See, e.g.,* Mealey v. Slaton Mach. Sales, Inc., 508 F.2d 87, 92 (5th Cir. 1975) (the United States Department of Labor and Bureau of Labor Statistics work life expectancy tables ruled admissible); Kershaw v. Sterling Drug, Inc., 415 F.2d 1009, 1012 (5th Cir. 1969) (mortality tables "freely admissible under federal Equity Practice"); Kanelos v. Kettler, 406 F.2d 951, 956 n.30 (D.C. Cir. 1968) (error for a trial judge to exclude mortality tables as evidence of plaintiff's life expectancy).

[525] *See, e.g.,* Wolcher v. United States, 200 F.2d 493, 498 (9th Cir. 1952) ("the state of the market and securities or commodities may be proved by reports or quotations in newspapers and trade journals"), *cert. denied,* 350 U.S. 822 (1955); General Elec. Employees Sec. Corp. v. Manning, 137 F.2d 637, 640-41 (3d Cir. 1943) (stock market quotations admissible to show value of stock at issue).

[526] *See, e.g.,* Doss v. Apache Powder Co., 430 F.2d 1317, 1322 (5th Cir. 1970) (safety manual admitted "to show long-standing common knowledge in the industry"). *But see* Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928, 930 (5th Cir. 1934) (court ruled National Electric Safety Code to be inadmissible); C.J. Tower & Sons Inc. v. United States, 351 F. Supp. 604, 605 (Cust. Ct. 1972) (company repair manual excluded as hearsay with the exception of certain drawings which were admitted as representations of machine involved), *aff'd,* 496 F.2d 1219 (C.C.P.A. 1974). *See generally* Annot., 75 A.L.R.2d 778 (1961).

[527] *See, e.g.,* Faser Smith Co. v. Chicago, R.I. & P. R.R., 435 F.2d 1396, 1402 (8th Cir. 1971) (pricing index admitted as proof of fair market value of goods damaged in transit).

[528] *See, e.g.,* Williams v. Campbell Soup Co., 80 F. Supp. 865, 868 (W.D. Mo. 1948) (city directory admitted as proof that company had an office in the state). *See generally* 2 BAYLOR L. REV. 104 (1949).

[529] *See, e.g.,* Rosado v. Wyman, 322 F. Supp. 1173, 1180-81 (E.D.N.Y.) (extensive lists of citations related to public opinion polls), *aff'd,* 437 F.2d 619 (2d Cir. 1970), *aff'd mem.,* 402 U.S. 991 (1971); Zippo Mfg. Co. v. Rogers Import, Inc., 216 F. Supp. 670, 682

Although the cases are few in number, there are Mississippi decisions recognizing the admissibility of market reports[531] and mortality tables.[532] Like the federal courts, the Mississippi judiciary felt that admission was justified because the public's unquestioning faith and reliance has confirmed those publications' accuracy.[533] Indeed, the court has even said that these publications constitute the best available evidence of their contents.[534] Despite its high esteem for these compilations, the Mississippi Supreme Court has held that government safety codes and regulations "are admissible only when they have been given compulsory force by the legislature."[535] Thus, the use of a published compilation may be limited to those prepared by private enterprise.

Rule 803(18). Learned Treatises[536]

Statements in learned treatises can be admitted by rule 803(18) to

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(S.D.N.Y. 1963) (public surveys not barred by hearsay rule); General Motors Corp. v. Cadillac Marine & Boat Co., 226 F. Supp. 716, 734-38 (W.D. Mich. 1964) (survey showing confusion that could result from alleged trademark infringement ruled admissible despite its hearsay character). *See generally* Sorenson & Sorenson, *The Admissibility and Use of Opinion Research Evidence*, 28 N.Y.U. L. REV. 1213 (1953); Note, *Public Opinion Survey as Evidence: The Pollsters Go to Court*, 66 HARV. L. REV. 498 (1953).

[530] For a categorical treatment of this area, see 4 WEINSTEIN'S EVIDENCE ¶ 803(17)[01], at 803-209 to -214 (1975).

[531] *See* Yazoo & M.V.R.R. v. M. Levy & Sons, 141 Miss. 199, 210-11, 106 So. 525, 526-27 (1925) (cotton exchange reports admissible).

[532] *See* Tucker v. Gurley, 179 Miss. 412, 418-19, 176 So. 279, 279-80 (1937) (standard mortality table admissible upon question of life expectancy); Vicksburg R.R., Power & Mfg. Co. v. White, 82 Miss. 468, 470-72, 34 So. 331, 331-32 (1903) (mortality tables admissible once it is shown that the person at issue belonged to one of the classes on the table). *But cf.* Kershaw v. Sterling Drug., Inc., 415 F.2d 1009, 1012 (5th Cir. 1969) (mortality tables "arguably subject to exclusion under Mississippi practice").

[533] *See, e.g.*, Yazoo & M.V.R.R. v. M. Levy & Sons, 141 Miss. 199, 106 So. 525 (1925).

> These market quotations are relied upon by the cotton trade; they are accepted without question as containing the true market value of the different grades and staples of cotton on the cotton markets of the country. The cotton trade without questioning acts on them, often investing enormous sums of money in cotton on the faith of their correctness.

Id. at 210, 106 So. at 527.

[534] *Id.*

[535] Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 220-21 (Miss. 1969) (dictum).

[536] FED. R. EVID. 803(18) provides:

> Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the

prove their truth. Although acknowledged as a hearsay exception by rule 803(18), learned treatises have traditionally encountered considerable opposition in achieving status as an exception. A number of reasons have been suggested as the basis for this opposition, including the following: (1) printed material is likely to be outdated because of rapidly shifting professional skills and knowledge; (2) a trier of fact is likely to be confused when confronted with data intended for a professionally trained reader; (3) the possibility of lifting sections of material out of context creates the danger of unfair use; (4) since most matters of expertise are in reality matters of skill rather than academic knowledge of the sort likely to be conveyed on the written page, witnesses testifying in person are likely to be more reliable than textual material; (5) most fundamentally, the author of the text is unavailable for cross-examination.[537]

Some commentators have penned specific retorts to these criticisms;[538] however, the exception's existence is most strongly justified by the accuracy inherent in scholarly documents[539] and the practical difficulties in proving their contents by alternative means.[540]

A survey of prerule authority indicates that learned treatises have been subject to a variety of admissibility requirements and usage restrictions.[541] According to the most restrictive view, the treatise is only

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> testimony or admission of the witness or by other expert testimony or by judicial notice [are admissible despite the declarant's availability]. If admitted, the statements may be read into evidence but may not be received as exhibits.

See Evidence 🔑 318(6), 360-65, 381.

[537] Bowers v. Garfield, 382 F. Supp. 503, 507 (E.D. Pa.), *aff'd mem.*, 503 F.2d 1398 (3d Cir. 1974).

[538] *See, e.g.*, 4 WEINSTEIN'S EVIDENCE ¶ 803(18)[01], at 803-215 to -217 (1975). Judge Weinstein suggests the following specific retorts: (1) material being outdated is not a valid concern, since a preliminary showing of reliability is required; (2) possible confusion of the jury is alleviated by rule 803(18) because the treatise is only admitted as substantive evidence when an expert is available for interpretive questions; (3) lifting material out of context is more a problem with oral testimony than written, because it is less obvious; (4) requiring the use of witnesses instead of books transforms a "battle of the books" into a "battle of the experts"; (5) unavailability for cross-examination is immaterial because of the material's impartiality, *i.e.*, not testifying for a fee, and the accuracy provided by professional scrutiny makes cross-examination unnecessary.

[539] *See* FED. R. EVID. 803(18), Advisory Comm. Note (a learned treatise is reliable because it "is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake"); Note, *Medical Treatises as Evidence—Helpful but too Strictly Limited,* 29 U. CINN. L. REV. 255, 261 (1960) (same).

[540] *See* Note, *Learned Treatises,* 46 IOWA L. REV. 463, 468 (1961).

[541] *See* Note, *supra* note 539, at 258. Court decisions admitting treatises can be grouped into the following categories: (1) cases in which the witness has relied generally on the reading; (2) those in which the witness acknowledges that the treatise offered by the cross-examiner is a standard authority; (3) those in which the authority of the treatise,

admissible to impeach an expert witness who has expressly relied on the treatise.[542] A more moderate position allows the document to be used as impeachment evidence once the witness acknowledges its authority[543] or once the document's authority is established by any means.[544] Under the liberal view, the treatises are judicially noticeable as substantive evidence regardless of the existence of expert testimony.[545] Rule 803(18) adopts a compromise position by allowing the treatise to be admitted as substantive evidence, but only if it has been introduced during the course of the direct or cross-examination of an expert witness.[546] The drafters imposed this requirement to further the evidentiary use of learned treatises,[547] while preventing misapplication by ensuring that an expert is available to interpret the publication.[548]

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although not acknowledged by the witness, is established by some other way such as judicial notice or the testimony of other experts. *Id.*

[542] *See, e.g.*, Hickock v. G.D. Searle & Co., 496 F.2d 444, 447 (9th Cir. 1974) (treatise inadmissible because it was not the basis for the expert's opinion); Bogacki v. American Mach. & Foundry Co., 417 F.2d 400, 407-08 (3d Cir. 1969) (per curiam) (statistical studies by National Fire Protective Association inadmissible because not shown to have been basis for expert's testimony).

[543] *See, e.g.*, Brown v. United States, 419 F.2d 337, 341 (8th Cir. 1969) (treatise inadmissible because testifying expert expressed no opinion on the issue and did not acknowledge treatise as authoritative).

[544] In Reilly v. Pinkus, 338 U.S. 269, 275 (1949), the Supreme Court stated that it is "illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books." The District of Columbia Circuit, interpreting *Reilly,* stated:

> Reilly v. Pinkus . . . stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field. It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use.

Dolcin Corp. v. FTC, 219 F.2d 742, 746-47 (D.C. Cir.) (footnote omitted), *cert. denied,* 348 U.S. 981 (1955).

[545] *See, e.g.*, UNIFORM RULES OF EVIDENCE 63, which provides: "A published treatise, periodical or pamphlet on the subject of history, science or art is admissible to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject."

[546] FED. R. EVID. 803(18); *see* Walker v. North Dakota Eye Clinic, Ltd., 415 F. Supp. 891, 894 (D.N.D. 1976) (treatise introduced in the direct examination); Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255, 268 n.22 (E.D. Pa. 1976) (rule 803(18) allows doctor to testify as to contents of medical treatise on direct examination). *But cf.* Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 85-86 (E.D.N.Y. 1975) (medical letter ruled inadmissible because its prejudice outweighed its probativeness).

[547] FED. R. EVID. 803(18), Advisory Comm. Note.

[548] *Id.* Early cases had been critical of judges who took judicial notice of learned treatises without the benefit of an expert to translate them. *See, e.g.,* Colwell v. Gardner, 386 F.2d 56, 71-72 (6th Cir. 1967); Sayers v. Gardner, 380 F.2d 940, 952 (6th Cir. 1967); Glendenning v. Ribicoff, 213 F. Supp. 301, 302 (W.D. Mo. 1962).

An additional admissibility requirement imposed by rule 803(18) is that the learned publication must be proved to be reliable. Under the federal rule, the treatise's authoritativeness may be established by the expert witness' concession,[549] by the testimony of another expert,[550] or by judicial notice.[551] By allowing the publication's reliability to be established by judicial notice or testimony from another expert, rule 803(18) avoids the possibility that the witness will block its use by refusing to acknowledge it.[552]

Once these requirements are satisfied, the treatise may be read into the record,[553] and the jurors may give it whatever substantive value they see fit. The jury is precluded, however, from treating the publication as an exhibit—it cannot be taken with them to the jury room.[554]

The Mississippi Supreme Court announced its position on the learned treatises hearsay exception in the 1882 case of *Tucker v. Donald.*[555] In *Tucker,* the plaintiff attempted to establish the existence of paralysis by having a physician read excerpts from *Copeland's Medical Dictionary* to the jury. The trial court disallowed the reading, and the Mississippi Supreme Court affirmed, stating:

> Extracts from such a book could be no more than a written statement of the opinion of the author, expressed perhaps many years be-

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[549] *See* Walker v. North Dakota Eye Clinic, Ltd., 415 F. Supp. 891, 894 (D.N.D. 1976) (reading of medical treatise allowed because doctor apparently acknowledged authority of the treatise when he tried to establish its irrelevance).

[550] FED. R. EVID. 803(18). *See also* De La Salle Inst. v. United States, 195 F. Supp. 891, 894 (N.D. Cal. 1961).

[551] *See* Generella v. Weinberger, 388 F. Supp. 1086, 1089-90 (E.D. Pa. 1974) (statements contained within learned medical publications are inadmissible hearsay unless they can be judicially noticeable as containing matters of common knowledge or as being "concededly" recognized as standard authority by the medical profession). Judicial notice can be used to establish a document's reliability but not to establish its admissibility as substantive evidence. See note 548 and accompanying text *supra.*

[552] FED. R. EVID. 803(18), Advisory Comm. Note. *But see* Bowers v. Garfield, 382 F. Supp. 503, 507-08 (E.D. Pa.) (trial judge precluded use of medical treatise because expert witness disagreed with the statements it contained), *aff'd mem.,* 503 F.2d 1398 (3d Cir. 1974).

[553] *See, e.g.,* Jeanes v. Milner, 428 F.2d 598, 605-06 (8th Cir. 1970) (allowing defendant to read excerpts from medical publication into record because rule 803(18) allowed it); Walker v. North Dakota Eye Clinic, Ltd., 415 F. Supp. 891, 894 (D.N.D. 1976) (rule 803(18) permitted plaintiff to read medical treatise into evidence).

[554] *See* Bair v. American Motors Corp., 473 F.2d 740, 744-45 (3d Cir. 1973) (per curiam) (noting that original version of rule 803(18) would have allowed treatise to go to the jury, but that revised (enacted) version prohibits such use), *noted in* 40 TENN. L. REV. 759 (1973). *But see* Gordy v. City of Canton, 543 F.2d 558, 564 (5th Cir. 1976) (allowing jury to take portions of National Electric Safety Code, admitted under rule 803(18), was "harmless in view of the other evidence").

[555] 60 Miss. 460 (1882).

> fore, liable to subsequent change or modification, not delivered under oath or in the presence of the court, with no opportunity for cross-examination by the other side, nor of explanation and application to the particular facts of the case in hand by the author. However high, therefore, may be the general character of the work, it lacks every safeguard which distinguishes hearsay from legal evidence . . . .[556]

The court, however, did not cease with this statement; it added dictum to the effect that

> [t]here is a class of books which are admitted before the jury as primary evidence; but these are such as relate to sciences deemed exact, or such as by long use in the practical affairs of life have come to be accepted as standard and unvarying authority in determining the action of those who use them.[557]

Subsequent cases have affirmed the general rule and rationale of *Tucker*[558] and have specifically held that publications of the National Fire Protection Association,[559] State Superintendent of School Health Services,[560] and American Association for Health and Physical Education[561] do not constitute books of exact science. Since all of these cases have found the *Tucker* "exact science" exception to be inapplicable, the meaning and correct application of this exception must be determined by future resolution.[562]

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[556] *Id.* at 470.

[557] *Id.*

[558] *See* Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216 (Miss. 1969).

> The general rule in this state, as elsewhere, is that books, pamphlets and treatises are not admissible into evidence to prove facts contained therein since they are generally considered hearsay evidence dealing with subjects on which living witnesses could be called to testify. There are exceptions to this general exclusionary rule whereby some documents dealing with more exact sciences may be admitted into evidence.

Id. at 220 (citations omitted).

In Milner Enterprises, Inc. v. Jacobs, 207 So. 2d 85 (Miss. 1968), the court explained the reasons for the *Tucker* rule.

> It has been said that the reason for the exclusion of books and pamphlets is: the sciences are in an unsettled condition; the technical language is not readily understandable by men of common experience; the books are written without the sanction of an oath; the authorities are not liable to cross-examination; and such books are but hearsay evidence of matters about which living witnesses could be called to testify.

Id. at 88.

[559] 207 So. 2d at 88.

[560] Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So.2d 216, 221 (Miss. 1969) (dictum).

[561] *Id.*

[562] *Tucker* had stated that "[t]o the first class belong almanacs, astrological calculations, tables of logarithms and the like, to the second, tables of life expectations in matters of insurance." Tucker v. Donald, 60 Miss. 460, 470 (1882). This was obviously meant to

Rule 803(19). Reputation Concerning Personal or Family History[563]

Rule 803(19) creates a hearsay exception for statements about an individual's personal or family history if the declarations were made by his family or associates. This paragraph encompasses the common law hearsay exceptions of pedigree and reputation. In order to explain rule 803(19)'s interrelation with other federal rules, the pedigree and reputation aspects of the rule must be developed separately.

The common law pedigree or family history hearsay exception is the source of several federal hearsay exceptions. Although there is some overlap, the separate application of the federal exceptions is determined by the manner in which the declaration was communicated. If the statement was written in a family Bible, genealogy, or the like, it is admissible under rule 803(13).[564] If, however, the statement was an oral representation made by one's family or associates, it is admissible under rule 803(19).[565] Finally, if the statement relates to pedigree of the declarant, it is admissible under rule 804(b)(4).[566] Each of these exceptions has different admissibility requirements, and a separate analysis of each is found in this Article.

Statements of pedigree or family history were traditionally recognized as hearsay exceptions because declarations by family members were believed to be inherently trustworthy. Additionally, there was a dearth of other available evidence.[567] To ensure reliability, the common law exception imposed several admissibility requirements. The declaration must have been made by a party whose family situation was at issue or by a member of that party's family;[568] the statements must have been made ante litem motam, that is, before the controversy arose;[569] and the

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serve as an indication of admissibility, but it is unclear which class, first or second, is admissible.

[563] Fed. R. Evid. 803(19) provides: "Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history [is admissible despite the declarant's availability]." See Evidence 🔑 285-97, 322, 324.

[564] Fed. R. Evid. 803(13).

[565] *Id.* 803(19).

[566] *Id.* 804(b)(4). *Compare id.* 803(19) *with id.* 804(b)(4)(B).

[567] Rassano v. Immigration & Naturalization Serv., 377 F.2d 971, 973 (7th Cir. 1966).

[568] *See Ex parte* Delaney, 72 F. Supp. 312, 323 (S.D. Cal. 1947) (in exclusion proceeding, testimony of petitioner concerning statements made by his father about his birth and childhood were admissible under pedigree hearsay exception), *aff'd,* 170 F.2d 239 (9th Cir. 1948).

[569] Although ante litem motam is technically defined as "[b]efore the commencement of the suit," Ballentine's Law Dictionary 78 (3d ed. 1969), the condition is more aptly stated as requiring the statement to be made before the controversy began. The

declarant must have had no apparent motive for misrepresenting the matter[570] and must be unavailable to testify.[571]

Although rule 803(10) is grounded in the common law, its departures from the traditional requirements are substantial. First, the ante litem motam requirement was deleted. The Advisory Committee's note to rule 803(19) gives no reason for the omission, but the note to rule 804(b)(4), another pedigree derivative, states that the requirement was deleted because it should affect the evidence's weight and not its admissibility.[572] Likewise, the requirement of unavailability was removed. This removal was logical, since statements of pedigree are more often based on general reputation than on the witness' firsthand knowledge.[573] The drafters of rule 803(19) explain the deletion of both the ante litem motam and unavailability requirements by stating that the character of reputation evidence is, in itself, a sufficient guarantee of trustworthiness.[574]

As previously stated, rule 803(19) allows admission of statements of reputation concerning personal or family history. "Reputation" is a nebulous concept that has been defined as the "character or status commonly ascribed to a person."[575] Instead of trying to establish what reputation is, more exact definitions have dealt mainly with what reputation is not, that is, not mere rumors and not what a few individuals think or say of a person.[576] Rule 803(19) attempts to set the parameters

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Supreme Court explained the need for this stricter requirement in Stein v. Bowman, 38 U.S. 209 (1839), stating,

> It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter, after the controversy has commenced. This would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. . . .
>
> It is therefore essential, when declarations are offered as evidence, that they should have been made before the controversy originated, and at a time, and under circumstances, when the person making them could have no motive to misrepresent the facts.

Id. at 220; *accord,* Rassano v. Immigration & Naturalization Serv., 377 F.2d 971, 973 (7th Cir. 1966).

[570] C. McCormick, *supra* note 4, § 322, at 746.

[571] This condition evolved into the requirement that the declarant be dead at the time of the trial. *See* Strickland v. Humble Oil & Ref. Co., 140 F.2d 83, 85-86 (5th Cir.) (declarations by a living aunt ruled inadmissible), *cert. denied,* 323 U.S. 812 (1944); Miami County Nat'l Bank v. Bancroft, 121 F.2d 921, 924 (10th Cir. 1941) (declarations admissible because declarant was "no longer alive").

[572] Fed. R. Evid. 804(b)(4), Advisory Comm. Note.

[573] Hale, *Proof of Facts of Family History,* 2 Hastings L.J. 1, 6 (1950).

[574] Fed. R. Evid. 803(19), Advisory Comm. Note.

[575] Rocha v. United States, 401 F.2d 529, 530 (5th Cir. 1968), *cert. denied,* 393 U.S. 1103 (1969).

[576] *See, e.g.,* Moore v. United States, 123 F.2d 207, 210 (5th Cir. 1941) ("mere rumors" are not reputation).

for evidence of repute by limiting the admission to facts of personal or family history.

Paragraph (19) allows evidence of reputation to emanate from three sources: family members, the community, and associates. Allowing reputation evidence from family members should create little controversy because, as one author noted, "Repute in the family is accepted by all courts as a means of proving matters of family history."[577] Reputation among associates and among the community involves essentially the same concept. Since the admissibility of community reputation is discussed under rule 803(21),[578] this presentation will be limited to repute among associates.

The drafters' commentary suggests that evidence of repute among associates was included in rule 803(19) to emphasize that the concept of community reputation is not limited to a single geographical situs.[579] The expansion of paragraph (19) to include repute among associates appears to be well-founded. Indeed, the United States Supreme Court has stated:

> The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated.[580]

Mississippi's initial adoption of the pedigree or family history hearsay exception evidenced a strict adherence to the common law requirement of ante litem motam and the requirements that the declarant be a family member, have no motive to falsify, and be unavailable due to death.[581]

Subsequent cases have not indicated any retreat from these requirements, but they have shown that the absence of other evidence may result in a relaxation of the requirements.[582] Nonetheless, the Mississippi judiciary does not intend to apply pedigree exceptions to allow hearsay proof of where a family event occurred.[583] Altogether, the legal development of the exception has been mundane. There is, however, one unique feature of the Mississippi decisions. The admissibility of a hearsay declaration of pedigree has been applied to an animal as well as to humans.[584]

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[577] Note, *Reputation,* 46 IOWA L. REV. 426, 435 (1961).

[578] See *Rule 803(21). infra.*

[579] FED. R. EVID. 803(19), Advisory Comm. Note.

[580] Fulkerson v. Holmes, 117 U.S. 389, 397 (1886).

[581] Henderson v. Cargill, 31 Miss. 367, 409 (1856).

[582] *See* Hathoway v. North, 190 Miss. 697, 702, 1 So. 2d 490, 491 (1941) (testimony of heirs to show who were other heirs admissible because this was "only available method of proving kinship").

[583] *See* Wise v. Wynn, 59 Miss. 588, 591-92 (1882) (hearsay declarations of pedigree are admissible to establish birth, death, and age, but not places).

Rule 803(20). Reputation Concerning Boundaries or General History[585]

Rule 803(20) provides that statements concerning the community reputation of land boundaries and historical events are exempt from hearsay attack. This exception, like the others, is based on the subject matter's trustworthiness, as well as on necessity for the evidence. Reliability is found in both the boundaries and history segments of the exception because reputation "represents the consensus of the community."[586] The United States Supreme Court acknowledged the necessity of the land boundaries exception when it stated, "Land marks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country, and from the other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries."[587] Statements relating to historical significance are necessarily admitted because of the unlikelihood that living witnesses are available to testify.[588]

Rule 803(20) deviates from the common law development of this exception in three ways. First, it eliminates the requirement that the boundary to be proved and the evidence of reputation offered be ancient.[589] The antiquity requirement was traditionally imposed as a guar-

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[584] Jones v. Memphis & A.C. Packet Co., 31 So. 201, 202 (Miss. 1902) (pedigree of mule proved by reputation). One wonders if the declarant met the requirement of being a family member.

[585] FED. R. EVID. 803(20) provides: "Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located [is admissible despite the declarant's availability]." See Boundaries 🔑 305(2); Evidence 🔑285-97, 322, 324.

[586] 4 WEINSTEIN'S EVIDENCE ¶ 803(20)[01], at 803-227 (1975).

[587] Boardman v. Lessees of Reed, 31 U.S. (6 Pet.) 328, 341 (1832).

[588] Note, *supra* note 577, at 434; *cf.* Connecticut Light & Power Co. v. Federal Power Comm'n, 557 F.2d 349, 356 (2d Cir. 1977) (historical treatises admissible to prove navigability); Montana Power Co. v. Federal Power Comm'n, 185 F.2d 491, 498 (D.C. Cir. 1950) (although hearsay, "it is settled that historical works generally considered authentic are admissible in evidence, especially in cases such as this one which must delve into relatively ancient and obscure origins of commerce on the nation's rivers"), *cert. denied,* 340 U.S. 947 (1951).

[589] For a discussion of the common law antiquity requirement, see Note, *supra* note 577, at 430-34.

antee of accuracy, and to compensate for its deletion, the rules' drafters placed additional reliability safeguards on each segment of the exception. Under the rule 803(20) boundaries exception the evidence sought to be admitted must antedate the controversy.[590] The history exception dispenses with the antedation requirement, but requires that the historical event be of national, state, or local significance.[591] An additional deviation made by paragraph (20) is the deletion of the requirement that the witness and documents be unavailable.[592] Removing the unavailability mandate requires little explanation; reputation evidence is not dependent upon the knowledge of a single declarant or object, but is based on the general community repute. Finally, the boundaries exception follows the American majority view by abolishing the historical limitation of the exception to public boundaries and extending application to private boundaries.[593]

Although no case could be found dealing with an historical reputation exception, Mississippi decisions have continually acknowledged the state's adherence to the land boundaries reputation exception. The exception was first recognized in 1858[594] and most recently affirmed in 1972.[595] The intervening cases have stated that necessity is the basis for the exception[596] and have reaffirmed the principle that the evidence must present general community repute rather than the beliefs of a single individual.[597] Mississippi has also shown progressiveness by extending the exception to include proof of private as well as public boundaries.[598]

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[590] FED. R. EVID. 803(19) & 803(21), Advisory Comm. Notes.

[591] *See* 4 WEINSTEIN'S EVIDENCE ¶ 803(20)[01], at 803-227 (1976) (requirement was necessary to ensure that development of community reputation was accompanied by general scrutiny).

[592] For a discussion of the common law unavailability requirement, see Note, *supra* note 577, at 431.

[593] 4 WEINSTEIN'S EVIDENCE ¶ 803(20)[01], at 803-225 (1976).

[594] *See* Nixon v. Porter, 34 Miss. 697, 707 (1858) (private boundary provable by common reputation).

[595] *See* Riley v. Richardson, 267 So. 2d 901, 904 (Miss. 1972) (where "a section corner cannot be identified by the field notes with reasonable accuracy, then the line can be established by general reputation in the community").

[596] *E.g.*, Burrow v. Brown, 190 So. 2d 855, 857 (Miss. 1966); Johnstone v. Nause, 233 Miss. 584, 596, 102 So. 2d 889, 894 (1958).

[597] *See* Vanzandt v. Vanzandt, 227 Miss. 133, 141, 85 So. 2d 792, 794 (1956) (reputation evidence as to property ownership was excluded because based on what individual had said and not on general reputation).

[598] *See* Burrow v. Brown, 190 So. 2d 855, 857 (Miss. 1966) (private corner established by common reputation); Nixon v. Porter, 34 Miss. 697, 707 (1858) (private boundary provable by community reputation).

Rule 803(21). Reputation as to Character[599]

Rule 803(21) creates a hearsay exception for statements made about a person's reputation by his associates or in his community. These statements are considered hearsay because they consist "of a summary of uncross-examined views expressed outside the courtroom offered to prove the truth of the matter asserted."[600]

Because there are sister rules dealing with the same subject, the purpose of rule 803(21) is unclear. Rule 404(a)[601] establishes the purposes for which reputation evidence is admissible, and rule 405(a)[602] states the methods of admission; therefore, rule 803(21) appears to serve merely as a safeguard for the availability of rules 404(a) and 405(a).

Paragraph (21) also leaves several questions concerning its scope unanswered. First, the rule does not explain who may testify about reputation. The rule states that the reputation evidence offered must concern repute among associates or community, but it gives no restrictions on the testifying witness. Second, there is no indication of the scope of the term community. Prerule cases defined the term broadly,[603] and the rule's admission of reputation among associates indicates an adherence to this trend. Consistent with this conclusion, Professor Moore has suggested that the proper definition of community under the rule "would be to restrict reputation evidence to the person's circle of associates or those having some direct or indirect contact with the person on a regular basis."[604] Finally, the rule places no restriction on the time period in which the statement can be made. This omission "leaves the way open for reputation generated during the course of the present controversy or to reputation antedating the present controversy for so long a period as to be worthless as evidence of present character."[605] These questions and the apparently repetitive scope of rule 803(21) leave its proper application a matter of uncertainty.

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[599] FED. R. EVID. 803(21) provides: "Reputation as to character. Reputation of a person's character among his associates or in the community [is admissible despite the declarant's availability]." See Criminal Law 🔑 379-80, 421; Evidence 🔑 285-97, 322, 324.

[600] 4 WEINSTEIN'S EVIDENCE ¶ 803(21)[01], at 803-228 (1976); *see* Michelson v. United States, 335 U.S. 469, 477 (1948). "When the defendant elects to initiate a character inquiry . . . not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay." *Id.*

[601] FED. R. EVID. 404(a).

[602] *Id.* 405(a).

[603] *See, e.g.,* United States v. Oliver, 492 F.2d 943, 945-46 (8th Cir. 1974) (community reputation includes college student's dormitory reputation). See notes 579 & 580 and accompanying text *supra.*

[604] 11 MOORE'S FEDERAL PRACTICE § 803(21), at VIII-188 (1976).

[605] *Id.*

The Mississippi law concerning reputation of character as a hearsay exception is scanty, but certain conclusions can be drawn concerning the general use of reputation of character evidence in the state.[606] First, the evidence of character may consist of general reputation or specific instances of conduct. The introduction of evidence of specific conduct is, however, limited to the proof of such elements as motive, intent, and knowledge and may not be used to establish a circumstantial inference of guilt.[607] Additionally, evidence of general reputation is limited to the defendant's reputation at the time of a crime[608] and to particular traits involved in a charge.[609] Furthermore, the supreme court does not allow the use of opinion evidence in establishing reputation[610] and, to ensure that a factual basis for the evidence exists, the court requires preliminary proof that the witness was actually acquainted with the subject of the testimony.[611] Finally, the scope of reputation evidence is limited to the subject's "community," a limitation that is to be determined on a case-by-case basis.[612]

Rules 803(22) and (23). Judgments of Previous Convictions, Personal, Family or General History, or Boundaries[613]

Rules 803(22) and 803(23) allow certain judgments to be admitted to prove the facts they contain. These exceptions do not deal with the conclusive res judicata or collateral estoppel aspects of prior judgments; to the contrary, they concern the admission of judgments to prove the facts they contain and are to be given whatever weight the jury sees fit.[614]

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[606] For a thorough discussion of the use of reputation evidence, see Brand & Palmer, *Relevancy and Its Limits,* 48 MISS. L.J. 935, 947-68 (1978).

[607] *See* Lewis v. State, 217 Miss. 488, 490-91, 64 So. 2d 634, 635 (1953) (evidence of specific acts admissible to show consent in prosecution for rape).

[608] Brooks v. State, 52 So. 2d 616, 620 (Miss.), *cert. denied,* 342 U.S. 863 (1951).

[609] Rosser v. State, 230 Miss. 573, 577, 93 So. 2d 470, 471 (1957).

[610] *Id.*

[611] Brooks v. State, 242 So. 2d 865, 868 (Miss. 1971).

[612] *Id.*

[613] FED. R. EVID. 803(22) provides:

> Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year [is admissible] to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Id. 803(23) provides: "Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, [are admissible] if the same would be provable by evidence of reputation." See Evidence 🔑 207(4), 208(1); Judgments 🔑 648.

Unlike most hearsay exceptions recognized by the federal rules, rules 803(22) and 803(23) are not predicated on a common law hearsay exception. Indeed, courts have traditionally been unreceptive to the use of judgments in this manner.[615] Courts feared that juries would grapple with the fine distinction between the judgment being conclusive via res judicata and the judgment being mere evidence. Additionally, there was apprehension that the party against whom the judgment was offered would have an inadequate opportunity to participate in the first proceeding. Finally, courts were influenced by the difficulty in determining which facts were the basis for the prior judgment.[616] This reasoning, however, has been the subject of detailed criticism.[617] The drafters of the rule felt that the reliability furnished by "the law's fact finding processes," coupled with the possibility of depriving the jury of highly relevant evidence, was sufficient rationale for the recognition of these exceptions.[618]

Because their admissibility requirements differ, rules 803(22) and (23) will be discussed individually. The first requirement of admissibility under rule 803(22) is that the judgment must have resulted from a prior criminal charge. Civil judgments are not allowed under this exception because their lower standard of proof makes them less trustworthy.[619] Civil judgments, however, are not totally excluded by the federal rules; they are admissible to the extent allowable under rule 803(23).[620]

The criminal judgment is admissible under paragraph (22) only if the crime for which the defendant was found guilty is a felony as defined by federal law. A felony is defined by 18 U.S.C. § 1 as anything punishable by death or imprisonment in excess of one year,[621] and this is the standard adopted for rule 803(22).[622] The drafters felt that use of a judgment from a lesser offense would be unjust "because motivation to defend at this level is often minimal or non-existent."[623]

The next requirement of admissibility is that the judgment must result from a jury verdict or guilty plea. A restatement of this requirement would be that all convictions are admissible except those rendered from pleas of nolo contendere,[624] a concept that is consistent with prerule case law.[625] A corollary problem is the use of judgments of acquittal. These are generally excluded as irrelevant because "they do not necessarily prove innocence."[626] There is, however, authority suggesting a contrary result.[627]

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[614] *See* FED. R. EVID. 803(22), Advisory Comm. Note; 11 MOORE'S FEDERAL PRACTICE § 803(22)[3], at VIII-190 to -191 (1976).

[615] Note, *Judgments as Evidence,* 46 IOWA L. REV. 400, 400 (1961).

[616] C. MCCORMICK, *supra* note 4, § 318, at 739.

[617] *See id.;* 4 WEINSTEIN'S EVIDENCE § 803(22)[01], at 803-229 to -231 (1976).

[618] FED. R. EVID. 803(22), Advisory Comm. Note.

[619] 4 WEINSTEIN'S EVIDENCE ¶ 803(22)[01], at 803-233 (1976).

[620] See notes 631 through 633 and accompanying text *infra.*

[621] 18 U.S.C. § 1 (1) (1970).

[622] FED. R. EVID. 803(22), Advisory Comm. Note.

[623] *Id.; accord,* 50 COLUM. L. REV. 529, 530 (1950).

Rule 803(22) states that a judgment of a felony conviction resulting from a jury verdict or guilty plea is admissible only "to prove any fact essential to sustain the judgment." Although there is no set rule defining "essential," the United States Supreme Court has indicated that the determination should be based "upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the court."[628]

The final concern for admission under rule 803(22) is the type of proceedings in which the judgment can be used. No distinction is made between the use of judgments in civil and criminal cases,[629] except to the extent that they involve convictions of third parties. In criminal prosecutions, the rule precludes the government from offering third party convictions for purposes other than impeachment. The drafters explained that "[a] contrary position would seem clearly to violate the right of confrontation."[630]

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[624] *See, e.g.,* Greenberg v. Cutler-Hammer, Inc., 403 F. Supp. 1231, 1234 (E.D. Wis. 1975) (citing rule 802(22), court held that previous mail fraud conviction entered under plea of nolo contendere was not admissible in later civil case for malicious prosecution).

[625] For admission of judgments based on guilty pleas, see State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683, 687 (8th Cir. 1968) (manslaughter guilty plea admissible in subsequent garnishment proceeding); Armco Steel Corp. v. North Dakota, 376 F. 2d 206, 208-10 (8th Cir. 1967) (guilty plea in earlier criminal suit for anti-trust violation admissible in later civil suit).

For disallowance of judgments resulting from pleas of nolo contendere, see Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412, 416 (7th Cir. 1963) (previous criminal anti-trust judgment based on plea of nolo contendere not admissible in later civil cases), *cert. denied,* 376 U.S. 939 (1964).

[626] 4 WEINSTEIN'S EVIDENCE ¶ 803(22)[01], at 803-233 (1976).

[627] *See* Bush, *Criminal Convictions as Evidence in Civil Proceedings,* 29 MISS. L.J. 276, 278 (1958) (author advocates use of acquittal because "the failure of the state to prove guilt of the required degree may have some tendency to show that the accused was not, in fact guilty.").

[628] Emich Motor's Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951).

[629] For prerule use of criminal convictions in subsequent civil cases, see State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683, 687 (8th Cir. 1968) (manslaughter guilty plea admissible in subsequent garnishment proceeding); Hardin v. Aetna Cas. & Sur. Co., 384 F.2d 718, 719 (5th Cir. 1967) (per curiam) (conviction for transportation of stolen money admissible in later civil suit for recovery of the stolen money), *cert. denied,* 391 U.S. 971 (1968); Connecticut Fire Ins. Co. v. Ferrara, 277 F.2d 388, 390 (8th Cir.) (applying Missouri law, court stated that prior criminal convictions are not admissible in subsequent civil cases unless offered by the party convicted), *cert. denied,* 364 U.S. 903 (1960).

[630] FED. R. EVID. 803(22), Advisory Comm. Note.

The second federal hearsay exception dealing with judgments is rule 803(23), which admits judgments concerned with matters of personal, family, or general history, or boundaries. This exception was recognized at common law because the nature of local trials made evidence of these judgments tantamount to reputation evidence.[631] This common law heritage led to the present requirement that the facts contained within the judgment must be provable as reputation evidence under rules 803(19) and 803(20).[632] Although no case citing rule 803(23) could be found, several prerule decisions recognized the existence of this exception.[633]

Mississippi has no established hearsay exceptions similar to rules 803(22) and (23). In Mississippi, the difference between a conviction by trial and a plea of guilty may determine whether evidence of the criminal proceeding is admissible in a civil action. The Mississippi Supreme Court adheres to the traditional rule that a judgment of conviction[634] or acquittal[635] in a criminal case is not admissible in a civil case as evidence of the facts upon which it was based. On the other hand, a plea of guilty to a criminal charge is admissible in a subsequent civil action as an admission or declaration against interest.[636]

The traditional rule prohibiting the admission of judgments of criminal conviction in subsequent civil actions has been the subject of much criticism, and there is a trend in many jurisdictions to admit such evidence as persuasive but not conclusive.[637] Mississippi should consider relaxing this prohibition, particularly when the convicted criminal is a party who seeks to take advantage of rights arising from the crime for which he was convicted.[638]

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[631] *See* FED. R. EVID. 803(23), Advisory Comm. Note.

[632] 4 WEINSTEIN'S EVIDENCE ¶ 803(23)[01], at 803-239 (1976).

[633] *See, e.g.,* Grant Bros. Constr. Co. v. United States, 232 U.S. 647, 662-63 (1914) (determination by immigration board that certain individuals were aliens admitted in later action against construction company for violation of Alien Immigration Act); Patterson v. Gaines, 47 U.S. (6 Howard) 550, 599 (1848) ("whenever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also"); United States v. Mid-Continent Petroleum Corp., 67 F.2d 37, 49 (10th Cir. 1933) (state judgment concerning pedigree was binding on the parties to the action and was "prima facie evidence but not conclusive" against other parties).

[634] *See, e.g.,* Gholson v. Smith, 210 Miss. 28, 31, 48 So. 2d 603, 605 (1950) (testimony on the outcome of a prior homicide proceeding was properly excluded in action on beneficiary's right to insurance proceeds); Adams v. Sigman, 89 Miss. 844, 848, 43 So. 877, 878 (1907) (prior conviction for illegal sale of liquors inadmissible in suit to recover statutory penalty for unlawful sale of liquor). *See generally* Bush, *supra* note 627, at 276.

[635] *See, e.g.,* Chatman v. Modern Builders, Inc., 227 Miss. 339, 344, 86 So. 2d 350, 352 (1956) (prior manslaughter acquittal inadmissible in workmen's compensation death benefit proceeding because burdens of proof differed); Young v. Davis, 174 Miss. 435, 438, 164 So. 586, 586 (1936) (in assault action, attempted introduction of prior criminal acquittal stemming from same incident was erroneous because burden of proof was different).

[636] *See, e.g.,* Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (plea of guilty to criminal charge of unlawful passing of a school bus admissible in later personal injury suit arising from the same event); Kelly v. King, 196 So. 2d 525, 526-27 (Miss. 1967) (plea of guilty to charge of murder admissible as an admission against interest in subsequent wrongful death action).

One other notable difference seems to exist between Mississippi law and the federal rules on this exception. The federal rules permit only the use of prior criminal convictions, whereas in one curious state case, the court admitted evidence of prior civil proceedings.[639]

Rules 803(24) and 804(b)(5). Other Exceptions[640]

Rules 803(24) and 804(b)(5) codify identical residual exceptions to the hearsay rule. These exceptions broadly authorize admission of needed and reliable hearsay statements that do not otherwise qualify under any of the established exceptions. The basic purpose of these residual exceptions is to provide an open and flexible means for dealing with new and unanticipated hearsay situations.[641]

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[637] C. McCormick, *supra* note 4, § 318, at 738-40. *See generally* Annot., 18 A.L.R.2d 1287 (1951).

[638] This approach is justifiable because a defendant in a criminal case has both the opportunity and the motive to defend fully. Moreover, a judgment in a criminal case is significantly more reliable evidence than a judgment in a civil case because of the higher burden of proof required in criminal cases.

[639] *See* Wilburn v. Balfour, 218 Miss. 791, 802, 67 So. 2d 857, 862 (1953) (prior civil proceedings showing defendant's dealings with agent admitted as evidence in subsequent trial to disprove the defendant's claim of being innocent purchaser for value).

[640] Fed. R. Evid. 803(24) provides:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is admissible despite the declarant's unavailability] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id. 804(b)(5) provides:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is admissible if the declarant is unavailable] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

See Criminal Law 🔑 419(1); Evidence 🔑 314(1); Federal Civil Procedure 🔑 1188.

Although precedent for the ad hoc admission of needed and reliable hearsay goes back at least sixty-five years,[642] the concept gained recognition in the 1961 Fifth Circuit decision of *Dallas County v. Commercial Union Assurance Co.*[643] Dallas County filed suit to recover on a policy insuring its courthouse against damage by fire or lightning. The clocktower of the courthouse collapsed, and Dallas County claimed that the collapse was caused by a recent bolt of lightning. Charred timbers were found in the debris, but the insurers denied that the courthouse had been struck by lightning and argued that the collapse resulted from structural defects. To explain the presence of the charred timbers, the insurers offered in evidence a copy of a fifty-eight-year-old local newspaper that carried an unsigned story about a fire in the courthouse. The trial court admitted the newspaper and the Fifth Circuit affirmed, ruling that the newspaper was necessary, trustworthy, relevant, and material, even though it did not fit any of the established hearsay exceptions.[644]

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[641] *See* FED. R. EVID. 803(24), Advisory Comm. Note.

> The preceding 23 exceptions of Rule 803 and the first five exceptions of Rule 804(b), . . . are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(5) are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.

Id.

[642] *See* G. & M. Merriam Co. v. Syndicate Publishing Co., 207 F. 515 (2d Cir. 1913). The Second Circuit adopted the opinion of District Judge Learned Hand which admitted in evidence a dictionary preface even though it did not fall within an established hearsay exception. Judge Hand reasoned, "I think it fair to insist that to reject such a statement is to refuse evidence about the truth of which no reasonable person should have any doubt whatever, because it fulfills both the requisites of an exception to the hearsay rule, necessity and circumstantial guaranty of trustworthiness." *Id.* at 518 (citation omitted). *See also* Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

[643] 286 F.2d 388 (5th Cir. 1961). For favorable reactions to the *Dallas County* decision, see 1961 DUKE L.J. 460; 15 VAND. L. REV. 288 (1961).

[644] 286 F.2d at 397-98. In the *Dallas County* opinion, the Fifth Circuit applied the two conditions that underlie all of the established hearsay exceptions—necessity and reliability. Explaining the necessity of the evidence, the court said:

After the *Dallas County* case, other federal decisions used similar reasoning to admit into evidence a variety of hearsay that did not qualify under a specific exception.[645] This developing trend, with some qualifications, eventually found its way into the new Federal Rules of Evidence as rules 803(24) and 804(b)(5).

The drafters of the Federal Rules of Evidence recognized that detailed rules could not provide for every contingency and that hearsay evidence may have great probative value even though it does not come under an established exception.[646] Thus, a flexible and open system was needed. In the 1969 preliminary draft of the rules, all hearsay state-

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> It is improbable—so it seems to us—that any witness could have been found whose recollection would have been accurate at the time of the trial of this case. And it seems impossible that the testimony of any witness would have been as accurate and as reliable as the statement of facts in the contemporary newspaper article.

Id. at 396. The court also felt that the evidence was highly reliable:

> There is no procedural canon against the exercise of common sense in deciding the admissibility of hearsay evidence. In 1901 Selma, Alabama, was a small town. Taking a common sense view of this case, it is inconceivable to us that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse—if there had been no fire. He is without motive to falsify, and a false report would have subjected the newspaper and him to embarrassment in the community.

Id. at 397.

[645] *See, e.g.,* Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1180-84 (5th Cir. 1975) (FAA advisory circulars recommending landing procedures for pilots approaching uncontrolled airports held admissible); Challoner v. Day & Zimmermann, Inc., 512 F.2d 77, 83-84 (5th Cir.) (trial court did not abuse discretion in admitting United States reports of shell tests), *vacated and remanded on other grounds,* 423 U.S. 3 (1975); Butler v. Southern Pac. Co., 431 F.2d 77, 79-80 (5th Cir. 1970) (where plaintiff injured while unloading plywood from defendant's freight car, it was error to exclude a subsequent report by defendant on proper methods to load plywood); Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632, 634-36 (5th Cir. 1969) (private check records held admissible as business record and because it was necessary and trustworthy; citing *Dallas County*); United States v. Kearney, 420 F.2d 170, 174-75 (D.C. Cir. 1969) (statement of police officer on day after he was shot admissible on the basis of its reliability and conformity to the general policies underlying exceptions to the hearsay rule, although not an excited utterance or dying declaration); Maroon v. Immigration & Naturalization Serv., 364 F.2d 982, 986-88 (8th Cir. 1966) (sworn statement of petitioner's father and record of his naturalization proceeding admissible to show alienage of petitioner since this evidence was reliable and trustworthy); Capitol Life Ins. Co. v. Rosen, 69 F.R.D. 83, 90-92 (E.D. Pa. 1975) (evidence of surveys conducted by and on behalf of the plaintiff insurance companies was admitted); United States v. Barbati, 284 F. Supp. 409, 412 (E.D.N.Y. 1968) (although hearsay and not within any of the established exceptions, prior out-of-court identification held admissible since the evidence was necessary, reliable, highly probative and opponent had an opportunity to attack it); Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 683 (S.D.N.Y. 1963) (apart from any established hearsay exception, evidence of surveys admitted on the basis of necessity and reliability).

[646] 4 WEINSTEIN'S EVIDENCE ¶ 803(24)[01], at 803-241 to -242 (1976).

ments having assurances of accuracy were admissible, and the rules merely enumerated illustrative examples.[647] The 1971 draft returned to the traditional approach of establishing specific exceptions, but added a residual exception to rules 803 and 804 that provided for the admission of "[statements] not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."[648] In this form, the Supreme Court adopted the residual exceptions and sent them to Congress.[649]

In Congress, the House deleted the proposed residual exceptions, believing that they injected too much uncertainty into the law of evidence and would impair the ability of parties to prepare for trial.[650] The Senate reinstated the exceptions in a more narrow form, substituting the word "equivalent" for "comparable" and adding subparts (A), (B), and (C).[651] In Conference action, the Senate version was accepted and, presumably as a compromise measure, the notice requirement was added.[652]

Although necessity and reliability are the two primary requirements of admissibility under rules 803(24) and 804(b)(5), the trial court must make five findings in order to admit evidence under the rules.[653] First, the hearsay statement must have circumstantial guarantees of trustworthiness equivalent to the established exceptions; however, since the established exceptions do not reflect one specific quantifiable degree of trustworthiness, there is considerable variation in the level of reliability.[654] Second, the statement must be offered as evidence of a material fact, a requirement that is also mandated by rules 401 and 402.[655] Third, the statement must be more probative than any other evidence that the proponent can procure through reasonable efforts.

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[647] *Id.* The illustrative examples were the hearsay exceptions that are now a part of the present rules.

[648] 11 MOORE'S FEDERAL PRACTICE § 803(24)[1], at VIII-194 (1976).

[649] *Id.* at VIII-195.

[650] H.R. REP. No. 650, 93d Cong., 2d Sess. 5-6, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7079.

[651] S. REP. No. 1277, 93d Cong., 2d Sess. 18-20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7079.

[652] CONF. REP. No. 1597, 93d Cong., 2d Sess. 18-20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7065-66.

[653] Although not required by the rule, the Senate report suggested that the trial court, in ruling on admissibility of hearsay under a residual exception, should dictate into the record the special facts and circumstances indicating the statement's high degree of trustworthiness and necessity. S. REP. No. 1277, 93d Cong., 2d Sess. 18-20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7064-66. This is an excellent suggestion that hopefully will be followed by the judiciary and will establish a well-defined body of law in this area.

[654] 11 MOORE'S FEDERAL PRACTICE § 803(24)[7], at VIII-208 (1976).

[655] *See* FED. R. EVID. 401, 402.

The "reasonable effort" standard is not defined, but it should be interpreted to admit hearsay when rejection would unduly burden and prejudice the proponent.[656] Fourth, the general purposes of the rules and the interest of justice must be served by admission of the statement. This requirement merely reiterates rule 102.[657] Fifth, the trial court must find that the adverse party had sufficient notice of the opponent's intent to introduce the hearsay statement, as well as the particulars of the statement, so that he has a fair opportunity for rebuttal. Although this notice requirement adds to an already burgeoning amount of pretrial work, it does not seem unreasonable unless rigidly applied. The name and address of the hearsay declarant may not always be known; therefore, it should be sufficient for the proponent to give the adverse party all the information that he could obtain by diligent inquiry. Also, when pretrial notice is not given, it may be sufficient for the court to grant an adjournment to give the adverse party an opportunity to prepare a rebuttal. The spirit of the rules would seem to give the court discretion in such matters.[658]

Although the new rules are still in an embryonic stage, the residual exceptions have been well-received by the courts, and the *Dallas County* logic of reliability and necessity is apparent in the cases decided under the rules. Most of these cases have admitted the offered hearsay evidence,[659] while a few cases have rejected it for a variety of reasons.[660]

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[656] 11 MOORE'S FEDERAL PRACTICE § 803(24)[7], at VIII-203 (1976).

[657] *See* FED. R. EVID. 102.

[658] *See* 11 MOORE'S FEDERAL PRACTICE § 803(24)[7], at VIII-209 (1976). Also, rule 403 requires that the probative value of and need for evidence be balanced against any harm likely to result from its admission. FED. R. EVID. 403.

[659] *See, e.g.,* United States v. Atkins, 558 F.2d 133, 135-36 (3d Cir. 1977) (error to refuse evidence of declarant's confession in prosecution of defendant for same crime where there was corroborating evidence to support trustworthiness); United States v. Medico, 557 F.2d 309, 316 (2d Cir. 1977) (admitting evidence of double-hearsay identification of getaway car in prosecution for bank robbery); United States v. Ward, 552 F.2d 1080, 1082-83 (5th Cir. 1977) (in prosecution for receipt of stolen goods, testimony of government agent concerning self-serving statement made by truck driver admissible to prove that truck was loaded with stolen equipment); United States v. Carlson, 547 F.2d 1346, 1352-55 (8th Cir. 1976) (admitting witness' grand jury testimony after witness refused to testify at trial), *cert denied,* 431 U.S. 914 (1977); United States v. Leslie, 542 F.2d 285, 289-91 (5th Cir. 1976) (admitting evidence of defendant's prior, extrajudicial, inconsistent statements as substantive evidence); United States v. Iaconetti, 540 F.2d 574, 577 (2d Cir. 1976) (in bribery prosecution, *X*'s testimony concerning statements made by defendant to *Y*, and related to *X* by *Y*, properly admitted), *cert. denied,* 429 U.S. 1041 (1977); United States v. Pfeiffer, 539 F.2d 668, 671 (8th Cir. 1976) (in prosecution for possession of stolen goods, admission of delivery invoices upheld); United States v. American Cyanamid Co., 427 F. Supp. 859, 865 (S.D.N.Y. 1977) (in antitrust case, letters between government officials and defendant company admitted); Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607, 611 (D. Alaska 1977) (admitting film depicting injured plaintiff since the film was more probative on the issue of pain and suffering "than any other evidence which the plaintiff could procure through reasonable efforts"). *See also* Frazier v. Continental Oil Co., 568 F.2d 378, 382 (5th Cir. 1978) (without referring to rules 803(24) or 804(b)(5), the Fifth Circuit discussed the admissibility of safety codes on the basis of their usual trustworthiness and necessity).

The Second Circuit's decision in *United States v. Medico*[661] is a striking example of judicial response to a particular factual situation. In a prosecution for armed robbery, the government adduced evidence of a double-hearsay identification of the getaway automobile, which was linked to the defendants by other evidence. The defendants argued that admission of this evidence was erroneous, since the government was unable to produce or identify either of the declarants and had failed to provide any pretrial notice of its intention to offer the evidence. Finding the double-hearsay evidence material, necessary, and reliable, the trial court admitted it. The Second Circuit affirmed, finding that "the government made serious efforts to locate [the declarants] to no avail" and ruling that the failure to give prior notice to the adverse party "was cured by the court's offer to grant the defense a five-day adjournment."[662]

Similar decisions have held that the pretrial notice requirement should not be an inflexible and imposing barrier to the admission of probative evidence.[663] These cases suggest that prejudice to the adverse party is the key in evaluating the effects of an absence of pretrial notice. Thus, it appears that strict compliance with the notice requirement will not be demanded in every situation.

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[660] *See, e.g.,* United States v. Mathis, 559 F.2d 294, 298-99 (5th Cir. 1977) (declarant was available and live testimony preferred, even under 803(24)); United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977) (refusing to admit testimony given to grand jury); United States v. Gomez, 529 F.2d 412, 417 (5th Cir. 1976) (refusing to admit evidence of informant's statement linking defendants to possession of marijuana); United States v. Yates, 524 F.2d 1282, 1285-86 (D.C. Cir. 1975) (admission of evidence barred by confrontation clause of sixth amendment); Arrow-Hart v. Covert Hills, Inc., 71 F.R.D. 346, 349 (E.D. Ky. 1976) ("Rule 803(24) was not intended to cover . . . a situation where the declarant is available but the parties just do not wish [to call him].").

[661] 557 F.2d 309 (2d Cir. 1977).

[662] *Id.* at 316 n.7.

[663] *See, e.g.,* United States v. Carlson, 547 F.2d 1346, 1355 (8th Cir. 1976) (grand jury testimony admitted and government excused from giving pretrial notice when witness refused on eve of trial to testify), *cert. denied,* 431 U.S. 914 (1977); United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976) (even if government failed to comply with notice requirement, defendant was not harmed since his counsel had fair opportunity to meet the statements); United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976) (absent prejudice to defendant, it was not error to allow introduction of evidence despite failure to comply with pretrial notice requirements), *cert. denied,* 429 U.S. 1041 (1977). *But see* United States v. Oates, 560 F.2d 45, 72-73 n.30 (2d Cir. 1977) (finding a legislative intent that the requirement of advance notice be strictly construed); United States v. Martorano, 561 F.2d 406, 408 (1st Cir. 1977) (statement would have been admissible if proper notice had been given).

One final comment should be made about rules 803(24) and 804(b)(5). It is apparent from the legislative history that neither the House nor the Senate wanted a rule that would allow the creation of new exceptions, but favored a rule that would admit hearsay in exceptional cases. Both the House and Senate believed that any major revisions of the hearsay rule, including the creation of new exceptions, would be best accomplished by amendments to the rule rather than by judicial decisions. Consequently, it is unlikely that new hearsay exceptions will be created through application of rules 803(24) and 804(b)(5).

Mississippi has no counterpart to the federal residual exceptions of rules 803(24) and 804(b)(5). Of course, some lawyers may humorously argue that such an exception does exist in Mississippi, masquerading under the guise of res gestae.[664] Res gestae may seem to be a catch-all exception because it has encompassed rulings on a wide range of evidence; however, the difference should be obvious.

Development and refinement of modern Mississippi evidentiary law calls for an open system that will admit, in exceptional cases, needed and reliable hearsay that does not come under a recognized exception. Guidelines should be clear and usage rare. Perhaps Mississippi's future uniform rules of evidence[665] will embrace a rule similar to the federal residual exceptions. In the meantime, there is no reason that Mississippi courts should not admit such evidence in appropriate cases.[666]

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

Rule 804 is a collection of those hearsay exceptions which the drafters of the federal rules considered justified only if the declarant was unavailable as a witness. Because unavailability is the hallmark of the rule 804 exceptions, the rule begins by defining unavailability in subdivision (a), while subdivision (b) lists the types of declarations that are admissible once the declarant's unavailability is established. The reason that unavailability was considered to be a necessary requirement is discussed under each exception.

It should be noted that the United States Supreme Court's version of rule 804 advocated the adoption of a "statement of recent perception" exception.[667] The exception was not adopted because Congress felt that

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[664] See notes 195 through 234 and accompanying text *supra*.

[665] See notes 829 & 830 and accompanying text *infra*.

[666] For a discussion of the inherent powers of the judiciary, see Newell v. State, 309 So. 2d 71 (Miss. 1975). *See also* Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287 (1972).

[667] Order, 51 F.R.D. 315, 438 (1971) (proposed rule 804(b)(2)).

> Statement of Recent Perception. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which

it lacked adequate safeguards of trustworthiness.[668]

Rule 804(a). Unavailability[669]

The unavailability of the declarant is a condition precedent to the admissibility of evidence under all of the rule 804 hearsay exceptions. Historically, unavailability has provided the necessity rationale supporting creation of the former testimony, dying declaration, declaration against interest, and statement of pedigree hearsay exceptions. Although the requirement appeared in each, there was no uniformity in development.[670] The drafters of the federal rules, finding no justification for the separatism, chose to standardize the unavailability requirement for all of the applicable exceptions.[671] The proposed uniformity resulted in specification of five instances of witness unavailability that will allow admission under rule 804(b).

Rule 804(a)(1) recognizes the accepted rule that witnesses who are physically present may exercise their privilege from testifying and thus

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> narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear is admissible.

Id. For discussions of this proposed rule, see 11 MOORE'S FEDERAL PRACTICE § 804.01[7], .01[1.—3], at VIII-227 to -229 (1976); 4 WEINSTEIN'S EVIDENCE ¶ 804(b)(5)[02], at 804-103 (1976).

[668] H.R. REP. NO. 650, 93d Cong., 1st Sess. 6 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7079-80.

[669] FED. R. EVID. 804(a) provides:

> "Unavailability as a witness" includes situations in which the declarant—
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of his statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

See Criminal Law 🔑 542-43; Evidence 🔑 284, 576-77.

[670] C. MCCORMICK, *supra* note 4, § 253, at 608.

[671] FED. R. EVID. 804(a), Advisory Comm. Note. *See generally* Comment, *Requirements for Unavailability of Witnesses in Criminal Cases Under the Federal Law of Evidence*, 29 RUTGERS L. REV. 133 (1975).

be unavailable for admissibility purposes.[672] The rule does, however, require that the privilege be recognized by the court before it is a basis for a finding of unavailability.[673]

Rule 804(a)(2) provides that the unavailability requirement is met when a physically available witness disobeys a court order and refuses to testify. It has been reasoned that practicality requires such a result. Consequently, various forms of refusal to testify have been recognized as grounds for unavailability.[674] The only implicit requirement to admission is that the court take all reasonable steps to solicit the witness' actual appearance before any hearsay evidence of his declarations is admitted.[675]

Lack of memory is recognized as a ground of unavailability by rule 804(a)(3). Because this subpart encompasses memory lapse caused by both disease and mere forgetfulness, there is a partial overlap between this rule and 804(a)(4). Although failure of memory due to disease is an obvious ground of unavailability, mere forgetfulness has not traditionally been so recognized. Courts felt that allowing a witness to plead lapse of memory would result in perjured claims of forgetfulness by witnesses who wanted to avoid the rigors of cross-examination.[676] Prior to the adoption of the federal rules, however, the federal courts had taken the relaxed view that both lack of memory because of disease[677] and lack of memory because of forgetfulness[678] were bases of unavailability. Rule 804(a)(3) adopts a compromise position by recognizing forgetfulness as unavailability but also requiring that the witness testify about his lack of memory. The drafters felt that this requirement of witness production and cross-examination would be an adequate protection against perjured claims of forgetfulness.[679] Finally, the use of former testimony of an otherwise available witness who is suffering from lack of memory has been questioned as potentially violative of a party's right of confrontation.[680] It appears, however, that the United States Supreme Court's decision in *California v. Green*[681] has resolved this question in the negative.

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[672] *See, e.g.*, M.S. Walker, Inc. v. Travelers Indem. Co., 470 F.2d 951, 952-53 (1st Cir. 1973) (employee's declaration against interest admissible because his exemption from testifying on grounds of privilege made him unavailable); United States v. Elmore, 423 F.2d 775, 778 (4th Cir. 1970) (declaration against interest admissible because declarant's successful assertion of fifth amendment privilege made him unavailable); United States v. Mobley, 421 F.2d 345, 348-51 (5th Cir. 1970) (admission of former testimony was not violative of confrontation clause because declarant's assertion of fifth amendment rights made him unavailable).

[673] FED. R. EVID. 804(a)(1) ("exempted by ruling of the court"). The use of privilege is also presumably limited by the types of privilege recognizable in the federal suit. *See id.* 501.

[674] *See, e.g.*, United States v. Brasco, 516 F.2d 816, 818-19 (2d Cir.) (former testimony admissible because witness' refusal to testify despite grant of immunity made him unavailable), *cert. denied*, 423 U.S. 860 (1975); United States v. Mobley, 421 F.2d 345, 349-51 (5th Cir. 1970) (refusal to testify through assertion of fifth amendment privilege made declarant unavailable); Mason v. United States, 408 F.2d 903, 905-06 (10th Cir. 1969) (declarant's refusal to testify despite being cited for contempt made him unavailable and his former testimony admissible), *cert. denied*, 400 U.S. 993 (1970).

[675] *See, e.g.*, United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976) (witness who refused to testify despite grant of immunity and imprisonment for contempt was unavailable), *cert. denied*, 431 U.S. 913 (1977); Mason v. United States, 408 F.2d 903, 905-06 (10th Cir. 1969) (witness cited for contempt before his former testimony was admitted), *cert. denied*, 400 U.S. 993 (1970).

[676] C. McCORMICK, *supra* note 4, § 253(5), at 611.

[677] *See, e.g.*, United States v. Amaya, 533 F.2d 188, 191-92 (5th Cir. 1976) (witness' injury in automobile accident and resulting loss of memory made him unavailable when there was no guarantee that memory would return), *cert. denied*, 429 U.S. 1101 (1977).

The fourth recognized instance of unavailability is absence resulting from death or infirmity. Death is unquestionably the most widely recognized form of unavailability,[682] and the only questions of admissibility involve substantiation of the death and avoidance of a confrontation clause violation.[683] Unavailability due to mental illness is equally well-established,[684] but the problem of temporary illness has made unavailability due to physical illness a more difficult issue. The Fifth Circuit's decision of *Peterson v. United States*[685] illustrates the problem. In *Peterson*, the court ruled that pregnancy did not make a witness unavailable and suggested that "permanent incapacity" was necessary.[686] Nonetheless, more recent decisions, which take a relaxed view of temporary physical incapacity, appear to be more representative of the law's current status.[687]

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[678] *See, e.g.*, McDonnell v. United States, 472 F.2d 1153, 1155 (8th Cir.) (witness' testimony concerning his failure of memory made his former testimony admissible), *cert. denied*, 412 U.S. 942 (1973).

[679] FED. R. EVID. 804(a)(3), Advisory Comm. Note; *see* United States v. Davis, 551 F.2d 233, 235 (8th Cir.) (witness' testimony about lack of memory made former testimony admissible), *cert. denied*, 431 U.S. 923 (1977). *But cf.* United States v. Collins, 478 F.2d 837, 838 (5th Cir.) (court refused to believe testimony of memory failure and therefore excluded former testimony), *cert. denied*, 414 U.S. 1010 (1973).

[680] *See, e.g.*, United States v. Collins, 478 F.2d 837, 838 (5th Cir.) (court considered the question but held right of confrontation not violated), *cert. denied*, 414 U.S. 1010 (1973); McDonnell v. United States, 472 F.2d 1153, 1155 (8th Cir.) (same), *cert. denied*, 412 U.S. 942 (1973).

[681] 399 U.S. 149, 167-68 (1970) (prosecution may rely on prior testimony to prove its case against defendant).

[682] *See* Mattox v. United States, 156 U.S. 237, 240-44 (1895) (testimony of a deceased witness who has testified at a former trial is admissible).

[683] *See* Pointer v. Texas, 380 U.S. 400, 407-08 (1965) (use of former testimony violated accused's right of confrontation).

[684] *See, e.g.*, United States v. Hughes, 411 F.2d 461, 463, 466 (2d Cir.) (witness' schizophrenia rendered him unavailable), *cert. denied*, 396 U.S. 867 (1969).

[685] 344 F.2d 419 (5th Cir. 1965).

[686] *Id.* at 425.

[687] *See, e.g.*, United States v. Bell, 500 F.2d 1287, 1290 (2d Cir. 1974) (surgery requir-

The final instance of unavailability recognized by rule 804(a) is inability to procure the witness' attendance or testimony. This instance of unavailability breaks from the uniform treatment applied by the other unavailability requirements and allows former testimony if the witness cannot be physically procured. But it allows dying declarations, declarations against interest, and pedigree statements only if both the witness and his testimony cannot be produced, that is, unless it is shown that the witness cannot be present at the trial and that he cannot be deposed.[688]

Rule 804(a)(5) refers to inability to procure a witness' attendance or testimony "by process or other reasonable means." Thus, unavailability is determined in part by the applicable court's power to procure a witness' presence or deposition via its subpoena power.[689] In determining if a person can be served, the nature of the action is of major importance. Criminal process is available anywhere in the nation,[690] but civil process is available only within the district or within a 100-mile radius of the hearing site.[691]

The inability of the court to serve process is not the only requirement of admissibility under rule 804(a)(5); it must also be shown that "other reasonable means" were not available to obtain the witness' deposition or attendance. The Supreme Court's ruling in *Barber v. Page*[692] suggests that "a good-faith effort" is the standard.[693] In a later case, the District of Columbia Circuit stated that a proper test would be to "require a search equally as vigorous as that which the [party] would undertake to find a critical witness if it has [no other evidence of his testimony]."[694] Regardless of the test to be applied, the requirements

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ing witness' confinement for two and a half months made her unavailable and her former testimony admissible); Phillips v. Pitchess, 451 F.2d 913, 918 (9th Cir. 1971) (pregnancy made witness unavailable but court stated that testimony was merely cumulative), *cert. denied,* 409 U.S. 854 (1972).

[688] *See* H.R. REP. No. 1597, 93d Cong., 1st Sess. 12 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7088. The original version of rule 804 did not contain this differentiation. *See* Order, 51 F.R.D. 351, 428 (1971) (proposed rule 804(a)(5)).

[689] *See* United States v. Hayes, 535 F.2d 479, 481-82 (8th Cir. 1976) (inability to serve process made witness unavailable and transcript of her former testimony admissible); Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 535-36 (2d Cir. 1972) (establishing court's lack of power to compel attendance is sufficient proof of unavailability), *cert. denied,* 412 U.S. 929 (1973).

[690] FED. R. CRIM. P. 17(e)(1).

[691] FED. R. CIV. P. 45(e)(1); *see* Castilleja v. Southern Pac. Co., 445 F.2d 183, 186 (5th Cir. 1971) (former testimony admissible because the witness was 269 miles away from the hearing site and therefore outside the court's civil subpoena jurisdiction).

[692] 390 U.S. 719 (1968).

[693] *Id.* at 725 (incarceration in federal prison is not unavailability because federal law allowed witness to be subpoenaed).

[694] United States v. Lynch, 499 F.2d 1011, 1023 (D.C. Cir. 1974).

of "other reasonable means" and unavailability will necessitate proof that a diligent but unsuccessful effort was made to obtain the witness.[695]

Although Mississippi has required proof of unavailability as a prerequisite to all the hearsay exceptions encompassed by rule 804,[696] unavailability has seldom been an issue of controversy. Nonetheless, in the few cases that address the issue, the state requirements appear to be more stringent than those of the federal rules. For instance, under the federal rules, inability to procure physical presence will allow admission of former testimony. The Mississippi Supreme Court has ruled, however, that physical absence does not establish unavailability if the witness' deposition can be taken.[697] Additionally, Mississippi has deviated from rule 804 in holding that mere absence from the jurisdiction is not a ground for unavailability, even though service of process would be unenforceable.[698] Despite this restrictive language, the final determination of unavailability would seem to be governed more by a factual evaluation of reasonable efforts than by the strict application of legal rubrics.[699]

Rule 804(b). Hearsay Exceptions Where Declarant Must be Unavailable

Rule 804(b)(1). Former Testimony[700]

Former testimony is a recognized hearsay exception both at com-

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[695] *See, e.g.*, Martin-Mendoza v. Immigration & Naturalization Serv., 499 F.2d 918, 921-22 (9th Cir. 1974) (fleeing of witness made him unavailable and his hearsay testimony admissible), *cert. denied*, 419 U.S. 1113 (1975); United States v. Squella-Avendano, 478 F.2d 433, 439 (5th Cir. 1973) (in absence of extradition treaty, witness' fleeing to Chile made him unavailable); M.S. Walker, Inc. v. Travelers Indem. Co., 470 F.2d 951, 952-53 (1st Cir. 1973) (constable's testimony about diligent but unsuccessful attempts to serve witnesses established their unavailability).

[696] See note 722 and accompanying text *infra* (former testimony); note 743 and accompanying text *infra* (dying declaration); note 757 and accompanying text *infra* (declaration against interest); note 787 and accompanying text *infra* (pedigree statement).

[697] *See* Gastrell v. Phillips, 64 Miss. 473, 478, 1 So. 729, 730 (1887) (former testimony inadmissible because witness could have been deposed in Louisiana). The federal rules apply the "ability to depose" requirement to dying declarations, declarations against interest, and pedigree statements, but not to former testimony. See note 688 and accompanying text *supra*.

[698] *E.g.*, Smith v. State, 247 So. 2d 705, 706 (Miss. 1971).

[699] *See, e.g.*, Peeples v. State, 218 So. 2d 436, 437-38 (Miss. 1969) (where witness states he will come if subpoenaed, but is never subpoenaed or given travel expenses, his unavailability is not established); Williams Yellow Pine Co. v. Williams, 187 Miss. 425, 432, 193 So. 1, 2 (1940) (witness not unavailable because judge was not shown that any efforts were made to determine the cause of his absence).

[700] FED. R. EVID. 804(b)(1) provides:

> Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding [is admissible if the declarant

mon law and under the federal rules, because the safeguards of oath and cross-examination give such testimony a high degree of trustworthiness. This reliability prompted the drafters of the federal rules to suggest that former testimony is "the strongest hearsay."[701] Additionally, its trustworthiness was the impetus for Professor Wigmore's conclusion that former testimony is not hearsay at all.[702] Nonetheless, the absence of "demeanor evidence," as well as the traditional favoritism for producing available witnesses,[703] resulted in some limitations on the exception. Under rule 804(b)(1), former testimony is admissible only when the following conditions are satisfied: (1) the declarant is unavailable;[704] (2) the testimony was given during the course of another hearing or in the form of a deposition;[705] (3) the party against whom the testimony is offered had a previous opportunity to develop the testimony;[706] and (4) the party against whom the testimony is offered had a similar motive to develop the testimony.[707]

By requiring that the testimony be given in a previous hearing or deposition, the federal rule incorporates the common law requirement that the previous testimony be given under the sanction of oath. Although neither the federal rule nor its commentary delineates this requirement, its existence and basis are uniformly established by case law.[708]

The primary foundation requirement for introduction of former testimony is that the party against whom the evidence is offered must have had an opportunity to develop the testimony at the earlier proceeding. The requirement of opportunity to develop expands the traditional "identity of parties" requirement. This expansion is significant because the misleading identity of parties requirement[709] has been used to exclude former testimony solely because the exact same parties were not

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> is unavailable], if the party against whom the testimony is now offered, or in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

See Criminal Law 🔑 540-48; Evidence 🔑 575-83.

[701] Fed. R. Evid. 804(b)(1).

[702] 5 J. Wigmore, *supra* note 4, § 1370.

[703] *See* Fed. R. Evid. 804(b)(1), Advisory Comm. Note.

[704] See notes 669 through 695 and accompanying text *supra.*

[705] See note 708 and accompanying text *infra.*

[706] See notes 709 through 716 and accompanying text *infra.*

[707] See notes 718 & 719 and accompanying text *infra.*

[708] *See, e.g.,* United States v. Bell, 500 F.2d 1287, 1290 (2d Cir. 1974) (prior testimony must be given under oath to be admissible); C. McCormick, *supra* note 4, § 255, at 616 (same).

[709] *See* C. McCormick, *supra* note 4, § 256, at 617-18 (terms the identity of party requirement to be a mere "catchword").

involved in both suits.[710] It is obvious that the addition of new parties to either side, or even a change in the party offering the evidence, has no bearing on the other party's "opportunity to develop" the testimony.[711]

In announcing the "opportunity to develop" requirement, rule 804(b)(1) treats civil and criminal cases differently, a distinction that was not made in the Supreme Court's initial recommendations.[712] In a criminal case, the party against whom the evidence is offered must have been a party in the earlier proceeding. In a civil case, it is sufficient that the party's predecessor in interest had an opportunity and similar motive to examine the witness in the earlier proceeding.[713]

In drawing the requisite relationship between the earlier and the present proceeding, the rule's use of the word "opportunity" is significant. Its use signifies that an opportunity to develop the testimony is sufficient, regardless of whether the opportunity was used.[714] The opportunity to develop has traditionally been satisfied if the present party had an opportunity to cross-examine, and the type of proceeding in which the prior testimony was elicited may determine whether this opportunity existed.[715]

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[710] *See, e.g.*, Dayco v. FTC, 362 F.2d 180, 185 (6th Cir. 1966) (identity of parties required).

[711] *See, e.g.*, Tug Raven v. Trexler, 419 F.2d 536, 542-43 (4th Cir. 1969) (testimony given at Coast Guard inquiry into cause of a disaster was admissible against another similarly situated who had chosen not to appear), *cert. denied*, 398 U.S. 938 (1970); Insul-Wool Insulation Corp. v. Home Insulation, 176 F.2d 502, 504 (10th Cir. 1949) (depositions taken in prior patent infringement suit admissible in later infringement suit even though defendants to second suit were different).

[712] Order, 51 F.R.D. 351, 438 (1971) (proposed rule 804(b)(1)).

[713] H.R. REP. No. 650, 93d Cong., 1st Sess. 15 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7088. Although not stated, the distinction provides an assurance that a criminal defendant's right of confrontation will not be violated. *See* 4 WEINSTEIN'S EVIDENCE ¶ 804(b)(1)[05], at 804-65 to -68 (1976).

[714] *See* Pointer v. Texas, 380 U.S. 400, 407 (1965) (at the previous hearing there must have been "a complete and adequate opportunity to cross-examine").

[715] Testimony taken at a prior trial is generally held to be admissible. *See* Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (transcript of witness' testimony in first trial admitted in evidence at the second trial); Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 534-37 (2d Cir. 1972) (expert testimony in Court of Claims admissible in later trial on patent infringement), *cert. denied*, 412 U.S. 929 (1973). Similarly, testimony is admissible if taken at a suppression hearing. *See* United States v. Curry, 471 F.2d 419, 421 (5th Cir.) (witness was unavailable for trial and had been cross-examined by all parties at the hearing), *cert. denied*, 411 U.S. 967 (1973). However, testimony is inadmissible if taken at a preliminary hearing. *See* Barber v. Page, 390 U.S. 719, 725-26 (1968) (opportunity for cross-examination of witness at preliminary hearing does not satisfy demands of confrontation clause unless witness is actually unavailable at subsequent trial); United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975) (issues not sufficiently similar and the suppression hearing testimony lacked "indicia of reliability"), *cert. denied*, 423 U.S. 1074 (1976). Additionally, testimony is not admissible if given to a grand jury. *See* Young v. United States, 406 F.2d 960, 961-62 (D.C. Cir. 1968) (no opportunity for cross-examination precludes admission).

Although the traditional requirement was opportunity of cross-examination, the federal rule states merely that an "opportunity . . . to develop" the testimony need exist. This departure from the common law expands the exception's use by recognizing direct examination as an equivalent of cross-examination. The expansion was justified on the ground that the traditional shackles of direct examination no longer exist. Thus, a party now has as much freedom on direct examination as on cross-examination.[716] Rules 607 and 611, which respectively allow impeaching one's own witness and leading questions on direct examination, substantiate this observation.[717]

The requirement that the party against whom the testimony is offered have a similar motive to develop the issues was derived from the common law "identity of issues" requirement. Identity of issues was traditionally required to ensure that the original cross-examination substantially covered the elements in the suit where admission is sought. The Second Circuit has stated that the issues in the two proceedings must be "sufficiently similar to assure that the opposing party had a meaningful opportunity to cross-examine when the testimony was first offered."[718]

The nature of the witness' testimony at the first trial is a key issue in the determination of motive to develop. If the factual issues to which the testimony was directed in the initial proceeding are the issues to which the testimony is to be directed in the second proceeding, the testimony should be admissible. The nature of the suit is immaterial because the substance of the testimony is the issue—not the form of the suit. The form of the suit is important only to the extent that it ensures the scope of cross-examination of the testimony.[719]

A practical problem of how to physically introduce the former testimony into evidence also exists. The most common method is to incorporate the transcript of the testimony into the record. Although this could present a double hearsay problem, the transcript would nevertheless be admissible under the public records exception of rule 803(8).[720] Another allowable method of introduction is by an observer's parol testimony, recounting what he remembers of the former testimony.[721]

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[716] Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of deliberate choice.

Fed. R. Evid. 804(b)(1), Advisory Comm. Note.

[717] Fed. R. Evid. 607, 611.

[718] United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976).

[719] *See* Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 676 (9th Cir. 1975) (change of issues in antitrust litigation meant that initial opportunity of cross-examination was insufficient); Cahn v. Nicholas, 408 F.2d 1, 4 (5th Cir. 1969) (subsequent introduction of alter ego issue to bankruptcy suit made scope of initial cross-examination too narrow).

Mississippi's application of the former testimony exception has mirrored the traditional development. In 1972, the Mississippi Supreme Court listed the following as criteria for the admission of former testimony:

> (1) Fomer testimony must have been given under oath;
>
> (2) The party against whom the testimony is now offered (or a party of like interest) must have had reasonable opportunities to cross-examine and confront the witness;
>
> (3) There must have been "identity of the parties", that is, there must have been privity between the witness in the former trial and the person against whom the testimony is offered in the second trial;
>
> (4) There must have been "identity of issues", that is, the matter investigated or prosecuted in the first proceeding must have arisen out of the *same transaction* as the charge being pursued in the second trial;
>
> (5) The witness must have been unavailable at the second proceeding . . . .[722]

Mississippi has also addressed the practical problem of introducing the testimony and has allowed its admission by transcript,[723] by parol testimony,[724] and even by the reading of a memorandum of evidence which is not part of the record.[725]

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[720] Fed. R. Evid. 803(8). See note 406 and accompanying text *supra.*

[721] *See* Fed. R. Evid. 803(5) (allowing notes to be used to refresh memory).

Ancillary rules on the admissibility of depositions include: Fed. R. Civ. P. 32(a)(3) (admissibility of a deposition in the same proceeding for which it was taken); Fed. R. Crim. P. 15(e) (admissibility of deposition in criminal trial); 18 U.S.C. § 3503(f) (Supp. VI 1977) (admissibility in criminal proceedings of depositions taken to preserve testimony). *See also* Note, 15 Okla. L. Rev. 63 (1962).

[722] Jolly v. State, 269 So. 2d 650, 654 (Miss. 1972) (quoting C. McCormick, Handbook of the Law of Evidence §§ 231-234 (1954)) (citations omitted). It should be noted that *Jolly* was a criminal case and that civil cases, when listing the admissibility requirements, have deleted the confrontation of the witness requirement. *See generally* Paulk v. Housing Auth., 228 So. 2d 871, 874 (Miss. 1969); Home Ins. Co. v. Gerlach, 220 Miss. 732, 737, 71 So. 2d 787, 788 (1954).

[723] *See* Miss. Code Ann. § 13-1-111 (1972) (use of transcripts in civil cases); Davis v. State, 255 So. 2d 916, 919-20 (Miss. 1971) (in criminal case, transcript should be read into the record, and the jury should not be allowed to take the transcript into the jury room), *cert. denied,* 409 U.S. 855 (1972).

[724] Jolly v. State, 269 So. 2d 650, 654-55 (Miss. 1972).

[725] Bell v. State, 90 Miss. 104, 110, 43 So. 84, 85 (1907).

Rule 804(b)(2). Statement Under Belief of Impending Death—Dying Declaration[726]

Rule 804(b)(2) embodies the common law dying declaration exception, but it has been expanded beyond its traditionally narrow limits. The common law exception was based on the belief that religious and psychological pressures of impending death provided a reliable substitute for the judicial safeguards of oath and cross-examination.[727] The federal rules have taken this presumption of reliability and refined it by imposing the following conditions of admissibility: (1) the statement will be admissible in criminal actions only if homicide is involved, but it is admissible in all civil actions;[728] (2) it must have been made under a belief of impending death;[729] (3) it must involve what the declarant believed to be the cause or circumstance of his impending death;[730] and (4) the declarant must be unavailable.[731]

Rule 804(b)(2)'s most significant diversion from the common law is the use of dying declarations in all civil cases. These declarations have traditionally been limited to cases involving allegations of criminal homicide.[732] The Supreme Court's version of rule 804(b)(2) would have allowed admission in all civil and criminal cases,[733] but Congress restricted its criminal usage to cases involving homicide. Congress justified its compromise position by stating that dying declarations should be admissible in all civil cases because "the stakes do not involve possible imprisonment."[734] Furthermore, they should be admissible in homicide proceedings because of the "exceptional need."[735] Such reasoning appears irreconcilable.

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[726] FED. R. EVID. 804(b)(2) provides: "Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death [is admissible if the declarant is unavailable]." See Evidence 🔑 275 ½; Homicide 🔑 200-21.

[727] *See, e.g.*, Mattox v. United States, 156 U.S. 237, 244 (1895) ("the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath"). *See also* 5 J. WIGMORE, *supra* note 4, § 1443.

[728] See notes 732 through 735 and accompanying text *infra*.

[729] See notes 736 & 737 and accompanying text *infra*.

[730] See note 738 and accompanying text *infra*.

[731] See notes 739 & 740 and accompanying text *infra*.

[732] *See, e.g.*, United States v. Sacasas, 381 F.2d 451, 454 (2d Cir. 1967) (bank robbery exculpation excluded); C. MCCORMICK, *supra* note 4, § 283, at 682. *But see* United Serv. Auto. Assoc. v. Wharton, 237 F. Supp. 255, 257-60 (W.D.N.C. 1965) (wife's dying declaration admissible to prove that husband caused auto accident); Thurston v. Fritz, 91 Kan. 468, 138 P. 625, 626-27 (1914) (landmark case in allowing dying declarations in civil action). *See generally* Annot., 47 A.L.R.2d 526 (1956).

[733] Order, 51 F.R.D. 351, 438 (1971) (proposed rule 804(b)(3)).

[734] H.R. REP. No. 650, 93d Cong., 1st Sess. 15-16, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7089; *see* 11 MOORE'S FEDERAL PRACTICE § 804.05(2)[4], at VIII-275 (1976).

The firmly entrenched requirement that the declaration be made under the apprehension of impending death provides the element of hopelessness that is the basis for the statement's theoretical reliability. Determination of the declarant's belief in imminent death has been a recurring problem since this exception was created by the English courts.[736] The declarant must have relinquished all hope of living; his concern that he may die is insufficient. The requirement was aptly summarized by Justice Cardozo when he stated:

> Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be "settled hopeless expectation" . . . . Despair of recovery may indeed be gathered from the circumstances if the facts support the inference. There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered though the period of survival runs the bounds of expectation. What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture.[737]

Rule 804(b)(2) also incorporates the traditional requirement that dying declarations may only be admitted if they concern what the declarant believed to be the cause or circumstances of his impending death. The Advisory Committee explained the retention of this limitation by stating, "When the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation."[738]

The final requirement imposed by rule 804(b)(2) is that the declarant be unavailable. Although the traditional approach required that the declarant be dead,[739] rule 804(b)(2) departs from tradition and sanctions the declaration's admissibility if it meets the general requirements of unavailability.[740] The removal of this limitation, however, is not a total boon. Although the declarant may be alive and his statement still be admitted, his survival may increase the difficulty of proving that he feared imminent death.

Mississippi's position on dying declarations is similar to rule 804(b)(2). The statement must be made under a sense of impending death[741] and reflect what the declarant believed to be the cause or circumstances of his impending death.[742] Nonetheless, Mississippi adheres to the traditional positions by requiring that the declarant be dead and by admitting dying declarations only in cases of homicide.[743] Also, Mississippi has admitted a dying declaration, otherwise qualified, that was not completed when the declarant died.[744]

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[735] H.R. REP. NO. 650, 93d Cong., 1st Sess. 15, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7089.

[736] *See* Quick, *Some Reflections on Dying Declarations,* 6 HOW. L.J. 109, 113 (1960).

[737] Shepard v. United States, 290 U.S. 96, 100 (1933) (citations omitted).

[738] FED. R. EVID. 804(b)(2), Advisory Comm. Note.

[739] C. MCCORMICK, *supra* note 4, § 282, at 681.

[740] See notes 669 through 695 and accompanying text *supra*.

Rule 804(b)(3). Statement Against Interest[745]

The federal rules' declaration against interest exception is based on the belief that one will not make statements impugning his own financial interest unless those statements are true.[746] At common law, trustworthiness and necessity were ensured merely by requiring that the declaration be against the declarant's pecuniary or proprietary interest and that the declarant be unavailable to testify.[747] Although based on the common law, rule 804(b)(3) has been expanded far beyond its traditional limits. Because of this expansion, as well as the need to alleviate past confusion, the drafters of the federal rules increased the requirements. These criteria must be met for statements against interest to be admissible: (1) the declarant must be unavailable,[748] and ordinarily will

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[741] *See, e.g.*, Kidd v. State, 258 So. 2d 423, 427 (Miss. 1972) ("If there is a glimmer of hope in his breast . . . the statements of the person making the declaration are not admissible in evidence"); Conway v. State, 177 Miss. 461, 468, 171 So. 16, 17 (1936) ("all hopes of recovery" must have passed before declaration is admissible).

[742] *E.g.*, Dean v. State, 173 Miss. 254, 279-80, 160 So. 584, 587 (1935).

[743] Phillips v. Dow Chem. Co., 247 Miss. 293, 307, 151 So. 2d 199, 204 (1963); *accord*, Walton v. State, 156 Miss. 499, 505, 126 So. 29, 30-31 (1930); Brown v. State, 32 Miss. 433, 441 (1856).

[744] Thomas v. State, 222 Miss. 488, 76 So. 2d 242, 243 (1954).

[745] Fed. R. Evid. 804(b)(3) provides:

> Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true [is admissible if the declarant is unavailable]. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

See Criminal Law 🔑 417(15); Evidence 🔑 272-84. *See generally* Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1 (1944); Morgan, *Declarations Against Interest*, 5 Vand. L. Rev. 451 (1952).

[746] Fed. R. Evid. 804(b)(3), Advisory Comm. Note (citing Hileman v. Northwest Eng'r Co., 346 F.2d 668, 670 (6th Cir. 1965)).

[747] C. McCormick, *supra* note 4, § 276, at 670.

[748] See note 669 and accompanying text *supra*. *See generally* Comment, *Evidence: The Unavailability Requirement of Declaration Against Interest Hearsay*, 55 Iowa L. Rev. 477, 478 (1969); 39 Mo. L. Rev. 461, 462 (1974).

not be a party;[749] (2) the statement, when made, must be against the declarant's pecuniary, proprietary, or penal interest;[750] (3) a reasonable man must have understood that such a statement was against his interest;[751] and (4) a statement exposing the declarant to criminal liability and offered to exculpate the accused requires corroborating circumstances of trustworthiness.[752]

Although rule 804(b)(3) does not expressly exclude statements made by a party to the case, the drafters' commentary suggests that rule 801(d)(2) will be used to admit statements of a party as admissions.[753] Under rule 801(d)(2), there is no requirement that a statement be against the party's interest when made.[754] Since there are more strictures of admissibility under rule 804(b)(3) than rule 801(d)(2), the practical effect will be the admission of statements by a party under rule 801(d)(2) and the admission of statements by a nonparty under rule 804(b)(3).

The addition of penal interest to the exception represents the greatest expansion made by rule 804(b)(3). Prerule cases uniformly held that statements against one's pecuniary or proprietary interest were admissible as hearsay exceptions,[755] but the decisions dealing with declarations against penal interest were in conflict.[756] The common law exclusion of the penal interest exception, and the federal rules' incorporation of it, was explained by the Advisory Committee when it stated:

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[749] See notes 753 & 754 and accompanying text *infra.*

[750] See notes 755 through 765 and accompanying text *infra.* The Supreme Court version of the rule also provided that statements which tend to make the declarant the "object of hatred, ridicule, or disgrace" were sufficiently against his interest to be admissible, but Congress rejected this addition because it felt such statements lack sufficient guarantees of reliability. H.R. REP. NO. 650, 93d Cong., 1st Sess. 16 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7089 (citing United States v. Dovico, 380 F.2d 325, 327 nn. 2 & 4 (2d Cir.), *cert. denied,* 389 U.S. 944 (1967)).

[751] See note 766 and accompanying text *infra.*

[752] See notes 758 & 759 and accompanying text *infra.*

[753] FED. R. EVID. 804(b)(3), Advisory Comm. Note. *See also* United States v. Atkins, 558 F.2d 133, 135 (3d Cir. 1977) (rule 804(b)(3) is concerned with trustworthiness of the out-of-court declarant, not the witness).

[754] FED. R. EVID. 801(d)(2). See notes 99 through 150 and accompanying text *supra.*

[755] *See* M.S. Walker, Inc. v. Travelers Indem. Co., 470 F.2d 951, 952-53 (1st Cir. 1973) (acknowledging embezzlement is against pecuniary interest); Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 42 (2d Cir. 1972) (confession of fraudulent securities dealings is against pecuniary interest); Gichner v. Antonio Troiano Tile & Marble Co., 410 F.2d 238, 242 (D.C. Cir. 1969) (threatened loss of employment qualified as being against pecuniary interest); Hileman v. Northwest Eng'r Co., 346 F.2d 668, 669-70 (6th Cir. 1965) (declaration by employee that machine, which had just caused his injury, was in good operating condition is against pecuniary interest). Despite this widespread recognition of the exception, the drafters feared that a narrow construction of pecuniary or proprietary interest would exclude tort cases. Accordingly, they included language dealing with civil liability and claims, thus emphasizing the admissibility of statements that tend to establish the declarant's tort liability or to extinguish his tort claim. FED. R. EVID. 804(b)(3), Advisory Comm. Note.

[756] *Compare* Chambers v. Mississippi, 410 U.S. 284, 299-302 (1973) (failure to admit

> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensable in logic, but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by a required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake.[757]

The inclusion of the penal interest exception was not, however, without qualification. As originally formulated by the Supreme Court, the rule required that declarations against penal interest offered to exculpate the defendant were not admissible unless "corroborated."[758] Congress required a further circumstantial guarantee of reliability by adding the phrase "unless corroborating circumstances clearly indicate the trustworthiness of the statement."[759]

The necessity of corroborating circumstances was occasioned by the Supreme Court's decisions in *Donnelly v. United States*[760] and *Chambers v. Mississippi.*[761] In *Donnelly,* a murder case, the key issue was the admissibility of a confession by a third party that he had committed the crime. Despite a blistering dissent by Justice Holmes, the confession was ruled to be inadmissible.[762] In *Chambers,* a murder conviction was reversed because the trial court refused to admit confessions by third parties, contributing to a denial of the defendant's due process.[763] Because of the theoretical inconsistency between *Donnelly* and *Chambers,* the "corroborating circumstances" qualification was included.[764] The cure, however, has created further complications, and the

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declarations against penal interest denied defendant due process of law) *and* United States v. Goodlow, 500 F.2d 954, 956-58 (8th Cir. 1974) (declarations against penal interest admissible) *with* United States v. Walling, 486 F.2d 229, 238 (9th Cir. 1973) (declarations against penal interest not admissible), *cert. denied,* 415 U.S. 923 (1974).

[757] FED. R. EVID. 804(b)(3), Advisory Comm. Note (citations omitted). *See generally* 24 ARK. L. REV. 567 (1971); 79 DICK. L. REV. 189 (1974); 43 TENN. L. REV. 374 (1976).

[758] H.R. REP. No. 650, 93d Cong., 1st Sess. 16 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7089-90.

[759] *Id.*

[760] 228 U.S. 243 (1913).

[761] 410 U.S. 284 (1973).

[762] 228 U.S. at 272-77.

[763] 410 U.S. at 302.

[764] H.R. REP. No. 650, 93d Cong., 1st Sess. 16 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7089-90. Another factor to be considered is the defendant's sixth amendment right to confront the witnesses against him. *See* Bruton v. United States, 391

courts are now struggling to determine the necessary level of corroboration.[765]

The final requirement of admissibility is that a reasonable man must understand that the statement is against his interest. The reason for this requirement is obvious; it is the knowledge of impugnity that supplies the basic premise of reliability. The only change made in this requirement is that the objective reasonable man standard is now to be applied, whereas in the past the test was phrased in the subjective term of the declarant's knowledge.[766]

Although the exception has been confused with admissions by a party, Mississippi decisions have established general requirements for the admissibility of declarations against interest. In Mississippi, the declarant must be unavailable, the declaration must be against the pecuniary or proprietary interest of the declarant, and the declarant must be personally cognizant of the fact stated, and must have no motive to falsify.[767]

These requirements are generally consistent with those established by the federal rules, the key deviation being Mississippi's failure to recognize declarations against penal interest. Until recent years, it was well settled that declarations against penal interest were inadmissible in Mississippi;[768] it appeared, however, that the United States Supreme Court's 1973 decision in *Chambers v. Mississippi*[769] would precipitate a change. Chambers's murder conviction was reversed because the state's refusal to admit declarations against penal interest was held to contribute to a denial of due process.[770] Nonetheless, the Mississippi Supreme Court held to its position in *Thompson v. State,*[771] distinguishing

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U.S. 123, 124-26 (1968) (admission of codefendant's confession violated right of confrontation despite instruction for the jury to disregard it).

[765] *See, e.g.,* United States v. White, 553 F.2d 310, 312-14 (2d Cir. 1977) (prostitute's declarations of employment were sufficiently trustworthy to allow their admission in prosecution of her procurer); United States v. Rogers, 549 F.2d 490, 498 n.8 (8th Cir. 1976) (declarant's confession of the crime for which defendant was charged not admissible because declarant's interest in obtaining a lesser sentence in return for cooperation made his confessions less trustworthy); United States v. Guillette, 547 F.2d 743, 754-55 (2d Cir. 1976) (confession inadmissible because corroborating circumstances did not indicate trustworthiness).

[766] *See* Filesi v. United States, 352 F.2d 339, 343 (4th Cir. 1965) ("It is implicit in the exception that for the declaration to be trustworthy the declarant must have known it was against his interest at the time he made the statement.").

[767] Coney v. Coney, 249 Miss. 561, 570, 163 So. 2d 692, 696 (1964); *accord,* Forrest County Coop. Ass'n v. McCaffrey, 253 Miss. 486, 493, 176 So. 2d 287, 289-90 (1965).

[768] *See, e.g.,* Brown v. State, 99 Miss. 719, 726, 55 So. 961, 961 (1911) (confession by defendant's brother ruled inadmissible).

[769] 410 U.S. 284 (1973).

[770] *Id.* at 302.

[771] 309 So. 2d 533 (Miss. 1975).

Chambers and holding that declarations against penal interests are not admissible "where the declarant is not available."[772] The distinction was considered justifiable because a key factor in the *Chambers* holding was the declarant's availability at trial.

Several months after *Thompson,* the state supreme court added to the confusion with its decision in *Lee v. State.*[773] Since the declarant in *Lee* was available during trial, the *Thompson* availability holding appeared applicable. The court, however, retreated to its pre-*Chambers* position and positively asserted, "This State does not recognize the declaration against penal interest exception to the hearsay rule."[774] *Lee* certainly appears to conflict with *Chambers,* despite the Mississippi Supreme Court's effort to distinguish *Chambers* as involving "a highly unusual set of facts."[775] *Lee* also appears to conflict with *Thompson,* which the court did not cite in its opinion.

The current Mississippi law on admissibility of declarations against penal interest is thus unsettled, particularly in view of the constitutional considerations that may require their admission under some circumstances. Consequently, the Mississippi Supreme Court will surely have to reconsider the issue in the future.

Rule 804(b)(4). Statement of Personal or Family History[776]

Rule 804(b)(4) allows admission of statements made by a declarant about his own personal or family history and, in certain instances, statements about another's personal or family history. Subpart (b)(4), like two other rules,[777] is a derivative of the common law pedigree hearsay exception.[778]

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[772] *Id.* at 535.

[773] 338 So. 2d 399 (Miss. 1976).

[774] *Id.* at 402.

[775] *Id.*

[776] Fed. R. Evid. 804(b)(4) provides:

> Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared [is admissible if the declarant is unavailable].

See Evidence 🔑 285-97, 322 & 324.

[777] *See* Fed. R. Evid. 803(13) (family records); *id.* 803(19) (reputation concerning personal or family history). For proper interrelation of the three rules, see notes 563 through 565 and accompanying text *supra.*

[778] See notes 566 through 570 and accompanying text *supra.* For prerule cases recog-

The common law pedigree exception imposed a requirement that the statements be ante litem motam, that is, made prior to the controversy, as a guarantee that the declarant had no motive to misrepresent the facts.[779] The drafters of the federal rules felt, however, that such a requirement should affect the evidence's weight and not its admissibility;[780] thus, it was deleted as a prerequisite for rule 804(b)(4) usage. The federal rules could afford to dispense with this safeguard because rule 403 gives the trial judge wide discretion to exclude evidence whose potential for abuse outweighs its probative value.[781]

An additional change made by rule 804(b)(4) is an enlargement of the permissible class of declarants. Although this class has traditionally been limited to family members,[782] the consanguinity requirement was removed to allow anyone "intimately associated with [the declarant's] family"[783] to testify under the exception. This extension recognizes that the frequent contact and strong bonds between close friends can provide sufficient trustworthiness to justify application of the exception.[784]

Additionally, rule 804(b)(4) liberalized the admission requirement that the declarant be unavailable. The rule removes the common law condition that the declarant must be dead[785] and substitutes the general requirement of unavailability.[786]

Unlike the federal rules, the Mississippi development of the pedigree exception has not been divided between statements of fact and reputation evidence. Therefore, the discussion of Mississippi law found under rule 803(19) is applicable to this section as well.[787]

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nizing the admissibility of pedigree statements made by a family member, see Liacakos v. Kennedy, 195 F. Supp. 630, 633 (D.D.C. 1961) (in deportation hearing, plaintiff's testimony that his mother had told him he was born in the United States was admissible under pedigree hearsay exception); *Ex parte* Delaney, 72 F. Supp. 312, 323 (S.D. Cal. 1947) (in exclusion proceeding, testimony by petitioner concerning statements made by his mother about his birth and childhood were admissible under pedigree hearsay exception), *aff'd*, 170 F.2d 239 (9th Cir. 1948).

[779] See note 569 and accompanying text *supra*.

[780] Fed. R. Evid. 804(b)(4), Advisory Comm. Note.

[781] Fed. R. Evid. 403. Note, however, that one author has questioned the use of rule 403 to exclude rule 804(b)(4) evidence because rule 804(b)(4) does not contain the phrase "unless circumstances indicate lack of trustworthiness." *See* P. Rothstein, Understanding The New Federal Rules of Evidence 454 n.43 (Supp. 1975).

[782] See note 569 and accompanying text *supra*.

[783] Fed. R. Evid. 804(b)(4).

[784] *See* 4 Weinstein's Evidence ¶ 804(b)(4)[01], at 804-99 to -100 (1976).

[785] See note 569 and accompanying text *supra*.

[786] See notes 669 through 695 and accompanying text *supra*.

[787] See notes 581 through 584 and accompanying text *supra*.

Rule 805. Hearsay Within Hearsay[788]

The problem of multiple hearsay arises when a witness testifies that one declarant stated to him that another declarant made a certain statement, and both statements are offered to prove the truth of the matters asserted.[789] The problem may also arise by the offer of documentary hearsay which includes other hearsay.[790] As an assurance of reliability and trustworthiness, hearsay contained within hearsay has traditionally not been admissible unless each of the out-of-court statements fell within an established exception to the hearsay rule.[791] Rule 805, which merely codifies the traditional rule, "is a necessary and logical application of Rule 802 which precludes admission of hearsay evidence unless it qualifies under an exception."[792] The cases that have addressed the multiple hearsay question since the federal rules' adoption indicate a lack of substantive change; the courts cite rule 805 while continuing to follow the traditional rule.[793]

A common source of multiple hearsay is business records, particularly police reports and hospital records. Consequently, the business records exception must be considered in conjunction with rule 805.[794] Hearsay within documents falling exclusively under the business records exception is admissible only if each declarant was under a business duty to make his report to the ultimate recorder.[795] This requirement, however, is not applicable if the included statement falls under some other exception.

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[788] Fed. R. Evid. 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." See Criminal Law 🔑 410, 436; Evidence 🔑 314, 317, 325, 351, 354; Federal Civil Procedure 🔑1190-91.

[789] C. McCormick, *supra* note 4, § 246, at 585.

[790] *Id.* An example of this would be a hospital report that is introduced to show that a patient's statements to his doctor were true. See note 371 and accompanying text *supra.*

[791] *See, e.g.,* Felice v. Long Island R.R., 426 F.2d 192, 196-97 (2d Cir.) (medical report which contained patient's statement inadmissible because it fell within no exception to the hearsay rule), *cert. denied,* 400 U.S. 820 (1970); Naples v. United States, 344 F.2d 508, 511 (D.C. Cir. 1964) (one police officer's testimony that another officer had told a witness that the defendant had confessed his guilt was double hearsay and inadmissible).

[792] 11 Moore's Federal Practice § 805.02, at VIII-294 (1976).

[793] *See, e.g.,* Cedeck v. Hamiltonian Fed. Sav. & Loan Assoc., 551 F.2d 1136, 1138 (8th Cir. 1977) (witness' testimony that declarant told witness what another person told declarant was inadmissible because the second statement was not an admission by party-opponent); United States v. Diez, 515 F.2d 892, 895-96 (5th Cir. 1975) (testimony that declarant had told witness what declarant had been told by another was admissible under the coconspirator rule).

[794] For a thorough discussion of the business records exception, which is embodied in the Federal Rules of Evidence as rule 803(6), see notes 329 through 378 and accompanying text *supra.* Rule 805 must also be read in connection with rule 602, which requires that a witness testify only from personal knowledge. Fed. R. Evid. 602.

[795] *Id.; see* United States v. Maddox, 444 F.2d 148, 150-51 (2d Cir. 1971) (business records properly admitted where record was made in normal course of business at detention center and recording inmate was under a business duty to record accurately responses

It is obviously more difficult to have multiple hearsay admitted since all of the objections that attach to simple hearsay are available against each of the out-of-court statements contained in the proffered evidence.[796] On the other hand, no multiple hearsay problem arises if the included statement is offered only to prove that it was made and not for the truth of the matters asserted.[797] In that event, only the encompassing statement must satisfy a hearsay exception. Conversely, only the included statement must qualify as an exception if the encompassing statement is a prior statement by a witness or an admission under rule 801(d).[798]

Rule 805 contains no limitation on the number of statements that an encompassing statement may contain, provided that each qualifies as an exception to the hearsay rule. Nevertheless, if a court should conclude that an excessive number of hearsay statements sufficiently dilutes reliability and trustworthiness, admission may be denied under rule 403 on grounds of "unfair prejudice, confusion of the issues, or misleading the jury."[799]

Although there is no Mississippi case specifically citing the traditional rule on multiple hearsay, the supreme court has considered factual situations that involved hearsay within hearsay and ruled the evidence to be inadmissible for various reasons. Unfair prejudice,[800] failure of the statement to qualify as part of the res gestae,[801] and hearsay within the proffered evidence[802] have all been cited as grounds for exclusion of

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of incoming prisoners); United States v. Grayson, 166 F.2d 863, 868-69 (2d Cir. 1948) (business record admissible only if declarant and entrant both were under a business duty to record the information).

[796] *See* C. McCormick, *supra* note 4, § 246, at 586.

[797] *See, e.g.*, United States v. Smith, 521 F.2d 957, 962 (D.C. Cir. 1975) (police report containing statement of declarant not falling within hearsay exception was admissible for impeachment purposes); United States v. Bohle, 445 F.2d 54, 62-63 (7th Cir. 1971) (admission of diagnoses of defendant's mental condition by members of hospital staff was not error); Bridger v. Union Ry., 355 F.2d 382, 392 (6th Cir. 1966) (police department accident reports were properly admitted, even though hearsay was included since the records were offered to prove they were made).

[798] 11 Moore's Federal Practice § 805.02, at VIII-297 (1976).

[799] *Id.* at VIII-297 to -298.

[800] *See* Simmons v. State, 48 So. 2d 601, 602 (Miss. 1950) (prejudicial to allow witness to tell what someone had told him that someone else said); Walker v. State, 135 Miss. 422, 427, 100 So. 9, 9-10 (1924) (officer's testimony about declarant's statements about defendant's confession was inadmissible as pure hearsay and injurious to rights of defendant).

[801] *See* Phillips v. Dow Chem. Co., 247 Miss. 293, 307, 151 So. 2d 199, 204 (1963) (statement of decedent to stepson, after fatal accident, that decedent had warned driver was inadmissible since it was not part of the res gestae).

[802] *See* Ludlow Corp. v. Arkwright-Boston Mut. Ins. Co., 317 So. 2d 47, 49-50 (Miss.

evidence containing multiple hearsay. These opinions certainly suggest that Mississippi recognizes the traditional rule. Accordingly, in addition to excluding multiple hearsay that fails to qualify, Mississippi courts should not hesitate to admit hearsay within hearsay when each statement qualifies as an exception.

Rule 806. Attacking and Supporting Credibility of Declarant[803]

Rule 806 permits an out-of-court declarant's credibility to be attacked and supported as if he had actually testified, based on the premise that a declarant whose hearsay statement is admitted into evidence is in effect a witness.[804] The credibility of a testifying witness is always subject to impeachment and support by extrinsic evidence, and rule 806 merely assures that the credibility of out-of-court declarants will be subject to the same scrutiny.[805]

Although credibility may be attacked in several ways, such as bias, character for untruthfulness, felony conviction, and inconsistency,[806] a special problem arises when inconsistent statements are used to impeach a hearsay declarant. This problem centers upon the traditional rule, now embodied in rule 613(b),[807] that an inconsistent statement may not be used for impeachment unless the witness is afforded an opportunity to deny or explain the statement.[808] This foundation requirement, which originated in *Queen Caroline's Case*,[809] is particularly troublesome in the area of hearsay because the inconsistent statement is often

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1975) (Corps of Engineers' report inadmissible in view of hearsay, irrelevant, and conclusory items within it).

[803] Fed. R. Evid. 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

See Witnesses 🔑 380.

[804] Fed. R. Evid. 806, Advisory Comm. Notes.

[805] 11 Moore's Federal Practice § 806.02, at VIII-303 (1976). *See generally* 4 Weinstein's Evidence ¶ 806[01] (1976).

[806] *See* Fed. R. Evid. 608, 609.

[807] *See id.* 613(b).

[808] Rule 613(b) relaxes the traditional rule relating to this foundation requirement. *Compare id.* 613(b) *with* Harrison v. State, 168 Miss. 699, 702, 152 So. 494, 495 (1934) (to impeach by an alleged previous statement, a witness must be apprised of the time, place, persons present, and matter which the inconsistent statement is designed to impeach).

[809] 129 Eng. Rep. 976 (C.P. 1820).

a subsequent one. It is almost impossible to call subsequent inconsistencies to a hearsay declarant's attention. Thus, strict adherence to this foundation requirement would deny the opponent, already barred from cross-examination, the benefit of this type of impeachment.[810]

Prior to the adoption of the Federal rules, most commentators favored the use of subsequent statements to impeach hearsay declarants,[811] but the lower courts were divided on the issue.[812] The United States Supreme Court, however, advocated retention of the foundation requirement in *Mattox v. United States*, [813] noting that

> while the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and fabrication of testimony, which, in criminal cases especially, would be almost irresistible.[814]

The dissent in *Mattox* warned that adherence to the requirement when the witness is dead "is to sacrifice substance of proof to orderliness of procedure, and the rights of the living party to consideration of the deceased witness."[815]

Rule 806 follows the dissent's logic and dispenses with the foundation requirement of rule 613(b) in all hearsay situations.[816] Accordingly, evidence of a prior or subsequent statement by the declarant, inconsistent with his hearsay statement, is not subject to any requirement that he have an opportunity to deny or explain it.[817] Rule 806 also extends this treatment to admissions by a party-opponent where the declarant is the party-opponent's agent, authorized spokesman, or coconspirator.[818] These latter sections were included to ensure that the credibility of all declarants would be subject to inquiry without regard to definitional boundaries.[819]

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[810] FED. R. EVID. 806, Advisory Comm. Notes.

[811] *See, e.g.*, C. MCCORMICK, *supra* note 4, § 37, at 69; 3A J. WIGMORE, *supra* note 4, § 1033, at 1037-38.

[812] Cases which allowed impeachment without a foundation include Carver v. United States, 164 U.S. 694, 697-98 (1897) (foundation requirement does not extend to dying declarations used for impeachment purposes); People v. Rosoto, 58 Cal. 2d 304, 23 Cal. Rptr. 779, 797, 373 P.2d 867, 885 (1962) (court reporter allowed to testify that witness in murder case later told her that he had lied because he was threatened), *cert. denied*, 372 U.S. 955 (1963); People v. Collup, 27 Cal. 2d 829, 167 P.2d 714, 718 (1946) (impeachment by subsequent statement allowed because impossibility of laying foundation was not fault of party urging impeachment); State v. Debnam, 222 N.C. 266, 22 S.E.2d 562, 564-65 (1942) (prior inconsistent statement used to impeach dying declaration). Cases denying impeachment for lack of foundation include Mattox v. United States, 156 U.S. 237, 250 (1895) (deceased witness' testimony at former trial could not be impeached with subsequent statements because deceased could not be questioned about such statements); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483, 494 (1940) (deceased witness could not be impeached because witness had no opportunity to explain or deny); Nagi v. Detroit United Ry., 231 Mich. 452, 204 N.W. 126, 128-29 (1925) (evidence that witness who committed suicide wrote a letter confessing he had been paid to testify falsely was excluded).

[813] 156 U.S. 237 (1895).

[814] *Id.* at 250.

[815] *Id.* at 260. *Compare id.* at 251-61 (Shiras, J., dissenting) *with* Carver v. United States, 164 U.S. 694, 698 (1897).

[816] For application of rule 613(b), see United States v. Lechoco, 542 F.2d 84, 89 n.6 (D.C. Cir. 1976); Rogers v. Roth, 477 F.2d 1154, 1159-60 (10th Cir. 1973).

Consistent with rule 607, which allows the credibility of a witness to be attacked by any party, rule 806 also provides that if hearsay is offered against a party who subsequently calls the hearsay declarant as a witness, that party may cross-examine him.[820]

Although numerous Mississippi cases have recognized the foundation requirement for impeachment by contradictory statements,[821] only once has the supreme court dealt with the issue of attacking a hearsay declarant's credibility. In *Kelly v. King*,[822] a wrongful death action, the testimony that a deceased witness had given at the criminal trial was admitted into evidence. Citing *Mattox v. United States*,[823] the court refused to admit a subsequent contradictory statement of the deceased because the witness had never been afforded the opportunity to deny or explain.[824] The court held that "where testimony given on a former trial by a witness since deceased is properly introduced into evidence, it is incompetent to show that such witness had stated, since the trial, that such testimony was untrue."[825] Thus, Mississippi law appears to be in direct conflict with rule 806. Perhaps the Mississippi judiciary will be persuaded by the Advisory Committee's logic that relaxed admissibility strictures on former testimony and depositions[826] call for a corresponding approach to impeachment.[827] Designed to make all pertinent evidence available to the trier of fact, this approach seems practical and fair.

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[817] FED. R. EVID. 806.

[818] *Id.*

[819] *See* 11 MOORE'S FEDERAL PRACTICE § 806.02, at VIII-303 to -304 (1976).

[820] FED. R. EVID. 806.

[821] *See* Church v. State, 179 Miss. 440, 445, 176 So. 162, 163 (1937) (to impeach a witness by previous statements, he must be apprised of the time, place, persons present, and impeaching matter); *see generally* Scott v. State, 274 So. 2d 376, 379-80 (Miss. 1973); Burnett v. Avera, 203 So. 2d 788, 790-91 (Miss. 1967); Nichols v. State, 220 Miss. 244, 247, 70 So. 2d 515, 516 (1954).

[822] 196 So. 2d 525 (Miss. 1967).

[823] 156 U.S. 237 (1895).

[824] 196 So. 2d at 528.

[825] *Id.* at 529. The court noted that while a majority of the Mississippi Supreme Court favored the *Mattox* rule, presiding Justice Gillespie and Justice Jones were of the opinion that the minority rule should be adopted by the court. *Id.*

[826] *See* FED. R. EVID. 804(b)(1).

[827] *Id.* 806, Advisory Comm. Notes.

CONCLUSION

The numerous exceptions to the hearsay rule prove that not all hearsay is untrustworthy. Ranging from thirdhand rumors to sworn prior testimony, hearsay has a wide scale of reliability.[828] These differences in reliability have contributed to a complex set of rules that attempt to screen the trustworthy from the untrustworthy. Despite their complexity, these rules have improved through evolution, and nowhere is this more apparent than in the treatment of hearsay by the Federal Rules of Evidence. The present culmination of the federal rules, however, is not the end; additional improvement is not only anticipated but expected.

In the future Mississippi is expected to adopt uniform rules of evidence for circuit, chancery, and county courts.[829] These rules should, of course, cover all aspects of hearsay. The present statutory authorization, if any is needed,[830] is unfortunately limited to civil actions.[831] Unlike rules of practice and procedure, it appears unwise to have separate evidentiary rules for civil and criminal cases. Hopefully, therefore, the Mississippi statute will be amended so that the forthcoming rules of evidence will apply to both.

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[828] C. McCORMICK, *supra* note 4, § 245, at 584.

[829] *See* MISS. CODE ANN. §§ 9-3-61 to -73 (1972).

[830] *See* Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform,* 43 MISS. L.J. 287 (1972). The author demonstrates that the Mississippi Supreme Court, as the constitutional body vested with the "judicial power" of the state, has the inherent power to promulgate rules of practice and procedure governing litigation in the courts of Mississippi. This inherent rule-making power extends to most questions of the admissibility of evidence. *Id.* at 305.

[831] MISS. CODE ANN. § 9-3-61 (1972).

AUTHENTICATION AND IDENTIFICATION

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INTRODUCTION

Authentication is the act of giving genuineness or veracity to a visual object or voice communication sought to be placed before the trier of fact.[1] More simply stated, authentication is the preliminary proof[2] that an item is what it is purported to be. Such proof must be established as a condition precedent to the proffered item's admissibility,[3] and only upon that proof does the item become relevant and proper for consideration by the trier of fact.[4] As stated in the Advisory Committee's note to rule 901(a) of the Federal Rules of Evidence, authentication and identification concern matters of conditional relevancy; they depend upon the existence of particular preliminary facts and are thus governed by the procedure set forth in rule 104(d).[5]

The requirements for authentication depend on the type of evidence involved. To authenticate a writing, for example, the proponent must show the genuineness and authorship of the writing by, or under the authority of, one of the parties. A letter purporting to be from *A*, which *B* intends to rely upon as an admission by *A*, has no probative value and is thus irrelevant, unless it is shown that *A* wrote or authorized the letter.[6] To introduce other types of demonstrative evidence directly involved in the incidents leading to trial, one must prove the identity of the particular item, its condition, and its relationship to the parties and issues on trial.[7] The preliminary facts required to authenticate demonstrative evidence offered merely to make oral testimony more comprehensible to the trier of fact are accuracy, trustworthiness, and relationship to the parties and issues on trial.[8] Finally, the preliminary fact required to authenticate a voice communication is the identity of the speaker either as one of the parties or as a third person if the communication was spoken to a party litigant.[9]

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[1] BLACK'S LAW DICTIONARY 168 (4th ed. 1951).

[2] E. MORGAN, BASIC PROBLEMS OF EVIDENCE 378 (4th ed. 1963).

[3] *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 218, at 543 (2d (E. Cleary) ed. 1972).

[4] E. MORGAN, *supra* note 2, at 378; *see* Lanier v. State, 291 So. 2d 695, 696 (Miss. 1974) (before a physical object of visual evidence may be introduced into evidence it must be shown to be relevant to the issues on trial).

[5] FED. R. EVID. 901(a), Advisory Comm. Note.

[6] *Id.* 104(b), Advisory Comm. Note.

[7] *See* 5 WEINSTEIN'S EVIDENCE ¶ 901(a)[01], at 901-15 (1976); 7 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2129, 2130 (3d ed. 1940).

The requirement that demonstrative evidence be authenticated as a condition precedent to its admission is based upon the significant impact such evidence has upon the lay trier of fact. Consequently, the trustworthiness of such evidence must be proved before it may be viewed by the lay trier of fact.[10] As Professor McCormick has written: "Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect."[11]

Of course, preliminary proof of authentication does not finally decide the issue. Even after an item has been sufficiently authenticated to permit its introduction into evidence, the jury may still elect to disbelieve the authentication proof or reject its proponent's claims of significance.[12] Similarly, even though a particular item may be both relevant and sufficiently authenticated, it may nevertheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[13] Furthermore, even if all of the foregoing hurdles are cleared, the item may still be excluded if it violates other rules of evidence, such as the hearsay rule or the requirement for an original. Many of the individual authentication rules, however, include provisions designed to satisfy these additional requirements.

Items of demonstrative evidence that played an actual part in the incident giving rise to the trial must be "identified" or connected with the incident. Two examples might be the alleged weapon in a murder prosecution[14] and the voice of a masked burglar.[15] Courts normally equate the term "identification" to authenticating demonstrative evidence other than writings that played an actual part in the incident giving rise to the trial.

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[8] See notes 57 through 78 and accompanying text *infra.*

[9] See *Rule 901(b)(5). infra.*

[10] 7 J. Wigmore, *supra* note 7, § 2129, at 564-65.

[11] C. McCormick, *supra* note 3, § 212, at 524-25 (footnotes omitted).

[12] 5 Weinstein's Evidence ¶ 901(a)[01], at 901-16 (1976); *see, e.g.,* United States v. American Radiation & Standard Sanitary Corp., 433 F.2d 174, 192 (3d Cir. 1970) (the ultimate issue of the authorship and probative weight to be afforded a writing is left to the jury), *cert. denied,* 401 U.S. 948 (1971); Carter v. State, 310 So. 2d 271, 273 (Miss. 1975) (the jury is the sole judge of the credibility of witnesses and of the weight to be given their testimony).

[13] Fed. R. Evid. 403.

The purpose of this Article is to explore these various concepts and problems by providing a comparison of the Mississippi and federal rules governing authentication, set against the framework of the applicable Federal Rules of Evidence. The authors hope that the contrast of applicable state and federal citations in this manner will permit the litigation attorney to use this Article as a ready reference in preparing for trial in either court system in Mississippi.

RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION[16]

Rule 901(a) provides that the requirement of authentication or identification "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The suffi-

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[14] 7 J. WIGMORE, *supra* note 7, § 2129, at 569.

[15] *See* FED. R. EVID. 901(5).

[16] *Id.* 901 provides:

> (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
>
> (2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
>
> (3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
>
> (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
>
> (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> (6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
>
> (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office,

ciency of such proof is initially a question for the court,[17] although the jury must make the final determination of whether the item is authentic and is what its proponent says it is.[18] Subdivision (b) contains illustrations of specific methods of authentication or identification that satisfy the general requirements of subdivision (a).[19] These methods substantially conform with those methods currently accepted by the Mississippi Supreme Court.

Rule 901(b)(1). Testimony of Witness with Knowledge[20]

Pursuant to rule 401 of the Federal Rules of Evidence, a witness' testimony as to his knowledge of the proffered item need not fully authenticate the item so long as the testimony is relevant on the issue of authentication.[21] Any combination of items of evidence illustrated throughout rule 901(b) will suffice to authenticate so long as the requirements of rule 901(a) are met.[22] Authentication through the testimony of a witness with knowledge, applicable to both demonstrative evidence

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> or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
>
> (8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.
>
> (9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
>
> (10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

See Criminal Law 🔑 339, 404, 429-49; Evidence 🔑 350-83; Federal Civil Procedure 🔑 1183, 1186, 1189.

[17] Authenticity and identity are categories of relevancy governed by rule 104(b) and are thus determined by the court. FED. R. EVID. 901, Advisory Comm. Notes.

[18] 5 WEINSTEIN'S EVIDENCE ¶ 901(a)[01], at 901-16 (1976). See note 13 and accompanying text *supra.*

[19] Since rule 901(b) uses experiences embodied in the common law and existing statutes to illustrate authentication methods that will satisfy the requirements of subdivision (a), FED. R. EVID. 901(b), Advisory Comm. Note, and since there have been very few reported cases decided under rule 901 during the brief period in which the Federal Rules of Evidence have been in effect, the authors will cite to federal cases decided before enactment of the rules in discussing the practical application of the authentication methods illustrated in rule 901(b).

[20] See note 16 *supra.*

[21] FED. R. EVID. 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See generally* Brand & Palmer, *Relevancy and Its Limits,* 48 MISS. L.J. 935 (1977).

[22] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(1)[01], at 901-22 (1976).

and voice communications, requires that sufficient preliminary proof be adduced to convince the court that the proffered item is what it is asserted to be.[23] Whether any given witness has the requisite knowledge of the item to authenticate it adequately is a matter within the discretion of the trial court, subject to reversal on appeal only upon a showing of abuse of discretion.[24]

A. Authentication of Private Writings

Before private writings will be received in evidence, valid execution or genuineness must be established.[25] Except where the ancient document rule is applicable,[26] a private writing, without explanatory testimony, does not constitute evidence.[27] The proponent must introduce competent proof that the writing is genuine and that the party who is purported to have written or executed it actually did so.[28]

While there are several alternatives under rule 901,[29] a person's handwriting or signature is primarily authenticated by a witness to the signing or drafting in question.[30] Business records, on the other hand, are not often as easily authenticated as signed or written documents.

Authentication of business records in federal litigation may be accomplished by satisfying the provisions of the Federal Business Records Act.[31] The Act codifies the "shopbook" rule,[32] and requires that "the record must have been made in the regular course of business; and the regular course of business must have been to make such records contemporaneously or within a reasonable time" after the transaction occurred.[33] The Act eliminates the requirement that the record maker, if available, verify the correctness of the records[34] and eliminates objections premised upon the hearsay and best evidence rules.[35] Furthermore, the foundation witness need not personally testify that the information contained in the document is accurate or that he prepared the document.[36] Anyone sufficiently familiar with the business practices may testify that the records qualify as being in the regular course of business.[37] The fact that the business record is maintained on a computer rather than on company books is immaterial in determining admissibility[38] under the Federal Business Records Act, although this subject is more properly treated as a process or system under rule 901(b)(9).[39]

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[23] FED. R. EVID. 901(b)(1).

[24] See notes 50, 64 & 78 and accompanying text *infra*.

[25] *E.g.*, Strider v. Calvert Fire Ins. Co., 226 Miss. 773, 777, 85 So. 2d 183, 185 (1956); 7 J. WIGMORE, *supra* note 7, § 2130, at 570.

[26] See *Rule 901(b)(8). infra*.

[27] Strider v. Calvert Fire Ins. Co., 226 Miss. 773, 777, 85 So. 2d 183, 185 (1956); *accord*, State v. Sims, 253 Miss. 458, 464, 176 So. 2d 261, 264 (1965).

[28] Strider v. Calvert Fire Ins. Co., 226 Miss. 773, 777, 83 So. 2d 183, 185 (1956); *accord*, State v. Sims, 253 Miss. 458, 464, 176 So. 2d 261, 264 (1965). As to the authentication of public documents, see *Rule 902(1).* through *Rule 902(5). infra*.

[29] *E.g.*, FED. R. EVID. 901(b)(2) - (4).

[30] *Id.* 901(b)(1), Advisory Comm. Note.

[31] 28 U.S.C. § 1732 (1972), *as amended by* Act of January 2, 1975, Pub. L. No. 93-595, § 2(b), 88 Stat. 1949 ("This [section] shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.").

[32] United States v. Mekjian, 505 F.2d 1320, 1325-26 (5th Cir. 1975).

[33] United States v. Anderson, 447 F.2d 833, 838 (8th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

[34] *E.g.*, Gray v. L.J. Navy Trucking Co., 475 F.2d 545, 548 (6th Cir. 1973).

Mississippi also applies the shopbook rule to determine admissibility of business records. Its elements are similar to the Federal Business Records Act and, moreover, are designed to satisfy the hearsay and best evidence requirements as well as those of authentication.[40] The Mississippi shopbook rule requires three basic items of proof for records other than computer records. First, the proponent must show the record was correctly made: in the regular course of business, as a part of the regular series of entries, and at or near the time of the occurrence of the transaction recorded.[41] Next, the entry must have been made in a book of accounts, which may consist of detachable leaves uniform and appropriate to an account book.[42] Finally, the proponent must prove the accuracy of the entries through the testimony of one who personally observed the transaction being recorded or who received the recorded information from someone who had a duty to transact the particular business and report it. If these people are not available and their absence is accounted for, proof of authenticity by other adequate means, such as proof of handwriting, is acceptable.[43] Additionally, the authors suggest, based upon existing precedent, that if there are separate original records for each entry, sales tickets for example, each original should also be produced.

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[35] *See, e.g.*, United States v. Anderson, 447 F.2d 833, 838-39 (8th Cir. 1971) (best evidence rule), *cert. denied*, 405 U.S. 918 (1972); Mitchell v. American Export Isbrandtsen Lines, Inc., 430 F.2d 1023, 1027 (2d Cir. 1970) (hearsay rule).

[36] *E.g.*, United States v. Fendley, 522 F.2d 181, 185 (5th Cir. 1975).

[37] *E.g.*, Lewis v. Baker, 526 F.2d 470, 474 (2d Cir. 1975); United States v. Leal, 509 F.2d 122, 127 (9th Cir. 1975).

[38] *E.g.*, United States v. Russo, 480 F.2d 1228, 1239-40 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); D & H Auto Parts, Inc. v. Ford Mkt. Corp., 57 F.R.D. 548, 551-52 (E.D.N.Y. 1973).

[39] See notes 199 through 203 and accompanying text *infra.*

[40] *See generally* Comment, *Business Entries in Mississippi,* 16 Miss. L.J. 266 (1944) (containing a comprehensive analysis of the purpose, history and operation of the Mississippi shopbook rule).

[41] *E.g.*, Greene v. Greene, 145 Miss. 87, 113, 110 So. 218, 223 (1926).

[42] *Cf.* W. T. Raleigh Co. v. Rotenberry, 174 Miss. 319, 319-20, 164 So. 5, 5-6 (1935) (invoice and ledger sheets not admissible because of uncertainty of recording system).

[43] Illinois Cent. R.R. v. Butterfield Lumber Co., 95 Miss. 357, 358, 49 So. 179, 180 (1909).

The preliminary proof required under rule 901(b)(1) to show authenticity of corporate records consists of the testimony of someone having personal knowledge of the matters reflected in such records and their accuracy. Preferably, such testimony should be elicited from the person who recorded the events or, alternatively, from someone who was present and participated in the matters.[44] The Mississippi rule also requires that the authenticity of the books of a corporation be shown before the books may be admitted into evidence.[45] More specifically, the party desiring to introduce a corporation's books must show that the books have been kept as a corporate record and that the entries were made by the proper officer or by some other person in the proper officer's absence.[46] The secretary is usually the custodian of the books and records of a corporation and is a proper person by whom to prove their authenticity.[47]

B. Authentication of Direct Demonstrative Evidence

Authenticating demonstrative evidence that played an actual and direct part in the incident giving rise to a suit requires proof that the item is what it is purported to be and that there has been no change in its condition since the time of the event in question.[48] The degree and extent of proof required depends upon the nature of the item offered, its uniqueness, and its susceptibility to change in condition.[49] The sufficiency of the identification foundation is a matter for the discretion of the trial court.[50]

The proffered chattel must first be associated with the person, time, place, or other condition relevant to the trial proceeding.[51] Under both federal and Mississippi practice, the identification does not have to be absolute, as the lack of certainty goes to the weight of the evidence and not to its admissibility.[52] Relevant objects found at the scene of a crime are admissible if not too remote in time.[53] The chattel must be substantially in the same condition as it was at the time of the occurrence that gave rise to the litigation.[54] Also, a proper showing of the chain of possession must be made as a condition precedent to the introduction of an item when there is any possibility of tampering with, or substitution of, the particular chattel.[55] Proof of continuous custody is not required, however, when adequate identifying marks have been placed on the chattel prior to a break in the chain of custody.[56]

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[44] *See* Annot., 65 A.L.R. 329, 330 (1930) (discussion of general rules of authentication of corporate records). *See also* United States v. Bonds, 526 F.2d 331, 335-36 (5th Cir. 1976) (testimony of a teller who had access to records and who had participated in some of the recorded transactions sufficiently authenticated bank records).

[45] *E.g.,* Smith v. Natchez Steamboat Co., 2 Miss. (1 Howard) 479, 492 (1837).

[46] *Id.* Proof of the accuracy of corporate records is not required, however, when all that is attempted to be proved is knowledge of a debt reflected on corporate records. *E.g.,* Williams Yellow Pine Co. v. Williams, 187 Miss. 425, 432, 193 So. 1, 2 (1940).

[47] Smith v. Natchez Steamboard Co., 2 Miss. (1 Howard) 479, 491 (1837).

[48] C. McCormick, *supra* note 3, § 212, at 527.

[49] *Id.*

[50] *E.g.,* United States v. Cartano, 420 F.2d 362, 364 (1st Cir. 1969), *cert. denied,* 397 U.S. 1054 (1970); Longmire v. United States, 404 F.2d 326, 327 (5th Cir. 1968), *cert. denied,* 395 U.S. 912 (1969); Carter v. State, 310 So. 2d 271, 273 (Miss. 1975).

[51] 7 J. Wigmore, *supra* note 7, § 2129, at 569.

C. Authentication of Illustrative Demonstrative Evidence

Guidelines have been developed by both the federal and Mississippi courts for authentication of frequently used illustrative devices, including photographs, maps, diagrams, drawings, and charts.[57] The established rule in both federal and Mississippi courts, in both criminal and civil cases, is that a photograph constitutes evidence only when it is authenticated or verified by oral testimony establishing that it is a faithful representation of the person, place, or subject it purports to portray.[58] This rule of testimonial authentication, however, does not require that the testimony supporting the accuracy be offered through the photographer.[59] As stated by the Mississippi Supreme Court in *Cinderella Foods, Division of Steven Industries, Inc. v. Miller*,[60] "The material inquiry is whether or not it is a fair and accurate reproduction and representation of conditions as they existed at the time of the occurrence involved."[61]

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[52] *E.g.*, United States v. Bankston, 424 F.2d 714, 716 (5th Cir. 1970); Wilson v. State, 270 So. 2d 697, 698 (Miss. 1972).

[53] *See* Wilkins v. State, 264 So: 2d 411, 413-14 (Miss. 1972) (burglary tools found near scene at time of defendant's arrest were properly admitted); Dillard v. State, 254 So. 2d 887, 890 (Miss. 1971) (rifle found in defendant's automobile near victim's body and which was claimed by defendant to be his ruled admissible); Moore v. State, 237 So. 2d 844, 849 (Miss. 1970) (weapons taken from defendant, including carbine with which victim was shot, were admissible in homicide prosecution).

[54] *E.g.*, United States v. Skelly, 501 F.2d 447, 451 (7th Cir.), *cert. denied,* 419 U.S. 1051 (1974); United States v. Clark, 425 F.2d 827, 833 (3d Cir.), *cert. denied,* 400 U.S. 820 (1970); Brewer v. United States, 353 F.2d 260, 262 (8th Cir. 1965); Ivey v. State, 232 So. 2d 368, 369 (Miss. 1970); Knight v. State, 204 So. 2d 566, 567 (Miss. 1967); Rose v. State, 170 Miss. 550, 554, 155 So. 341, 342 (1934).

[55] *E.g.*, United States v. Santiago, 534 F.2d 768, 769 (7th Cir. 1976); United States v. Bridges, 499 F.2d 179, 185 (7th Cir.), *cert. denied,* 419 U.S. 1010 (1974); Nix v. State, 276 So. 2d 652, 653 (Miss. 1973); Grady v. State, 274 So. 2d 141, 143 (Miss. 1973).

[56] *See, e.g.,* Harrison v. State, 307 So. 2d 557, 560-61 (Miss. 1975) (proof of chain of custody not necessary when pathologists and ballistics expert placed identifying marks on bullet, thereby ruling out any reasonable inference that one bullet was substituted for another); Clanton v. State, 279 So. 2d 599, 601 (Miss. 1973) (no error in admitting marijuana into evidence, although continuous possession of the marijuana was not shown, where it had been sealed and person who placed seal thereon testified that it had not been broken); McCormick v. State, 279 So. 2d 596, 598 (Miss. 1973) (same).

[57] Authentication of movies, X-ray pictures, other medical test results, general tests and experiment results, polls, surveys and samples is covered by rule 901(b)(9).

[58] *E.g.,* Carson v. Squirrel Inn Corp., 298 F. Supp. 1040, 1048 (D.S.C. 1969); City of West Point v. Meadows, 236 Miss. 394, 399, 110 So. 2d 372, 374 (1959); Jones v. State,

The accuracy required to authenticate a photograph varies with the nature of the illustration the photograph is offered to supply. When photographs are offered merely as general representations of physical objects for the convenience of explaining the statements of witnesses, very slight proof of accuracy may be sufficient. When photographs are offered as representing handwritings which are to be subjected to minute and detailed examination, or of other objects when slight differences of size are of vital importance, much more convincing proof should be required.[62] In such matters, photographs may not only be inaccurate but dangerously misleading, whether due to the artist's want of skill, inadequate instruments or materials, or intentional manipulation.[63] Both federal and Mississippi practice acknowledge the question of the sufficiency of authentication of photographs as a matter of discretion for trial courts subject to the "abuse of discretion" test on appeal.[64]

When photographs are satisfactorily shown to be truthful representations of the object or scene at the time of the occurrence in question, it is immaterial when they were taken.[65] As stated in *Gulf, Mobile & Ohio Railroad v. Golden*:[66]

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228 Miss. 296, 300-01, 87 So. 2d 573, 574-75, *cert. denied,* 352 U.S. 937 (1956); Gulf, M. & O.R.R. v. Golden, 221 Miss. 253, 262-64, 72 So. 2d 446, 450 (1954); Orr v. Columbus & G. Ry., 210 Miss. 63, 66-67, 48 So. 2d 630, 631-32 (1950).

[59] Kleveland v. United States, 345 F.2d 134, 136-37 (2d Cir. 1965); Boyle v. Ward, 39 F. Supp. 545, 548 (M.D. Pa.), *aff'd,* 135 F.2d 672 (3d Cir. 1941); *cf.* Jones v. State, 228 Miss. 296, 300, 87 So. 2d 573, 574 (photographs are properly admitted upon a showing that the scene is accurately portrayed), *cert. denied,* 352 U.S. 931 (1956); Orr v. Columbus & G. Ry., 210 Miss. 63, 67, 48 So. 2d 630, 631-32 (1950) (practical considerations have led courts to admit photographs that reproduce a scene which is reasonably accurate).

[60] 52 So. 2d 641 (Miss. 1951).

[61] *Id.* at 643; *accord,* Flora v. Fewell, 241 Miss. 345, 348, 131 So. 2d 187, 188 (1961).

[62] Annot., 9 A.L.R.2d 899, 904 (1950) (citing Cunningham v. Fair Haven & W.R.R., 72 Conn. 244, 43 A. 1047 (1899)).

[63] Annot., 9 A.L.R.2d 899, 904-05 (1950).

[64] *E.g.,* United States v. White, 454 F.2d 435, 438 (7th Cir.), *cert. denied,* 406 U.S. 962 (1972); Jackson v. United States, 395 F.2d 615, 618-19 (D.C. Cir. 1967); Irving v. State, 228 So. 2d 266, 270 (Miss.), *vacated in part on other grounds,* 408 U.S. 935 (1969).

[65] *E.g.,* Crawford v. State, 223 Miss. 189, 193-94, 77 So. 2d 923, 924-25 (1955); Gulf, M. & O.R.R. v. Golden, 221 Miss. 253, 263, 72 So. 2d 446, 450 (1954); Hancock v. State, 209 Miss. 523, 535-36, 47 So. 2d 833, 838-39 (1950); Wheat v. Teche Lines, Inc., 181 Miss. 408, 418, 179 So. 553, 555 (1938).

[66] 221 Miss. 253, 72 So. 2d 446 (1954).

> The time at which a photograph offered in evidence was taken is important only with reference to the question of probability of change in condition of the object or objects portrayed. The mere fact that a photograph was taken at a time different from that in question does not render it inadmissible if the witness is able to verify it as a substantial representation of the conditions as they existed at the time in question. Nor does the fact that the conditions were somewhat changed before the photograph was taken render the photograph inadmissible if the changes were not material, and if the changes are carefully pointed out and brought to the jury's attention.[67]

This same view on the materiality of the time of taking a photograph has been applied by the federal courts.[68]

Greater care must be taken in authenticating photographs of recreated scenes because of the increased probability of prejudice.[69] "[A] photographer cannot set up a scene, as pointed out by others, and photograph such an arrangement so as to indicate evidence drawn from deductions and conclusions of others."[70] In those situations in which photographs of recreations are sought to be introduced, trial judges must be particularly careful to require substantial similarity of conditions before allowing admission. Thus, an attorney attempting to introduce the photographs must be particularly careful in preparing them to ensure substantial identity between the recreation and the actual occurrence. Also, the authenticating witness should give detailed testimony as to the accuracy of the photographic recreation of the actual scene.

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[67] *Id.* at 263, 72 So. 2d at 450.

[68] United States v. Bucon Constr. Co., 430 F.2d 420, 425 (5th Cir. 1970); Jenkins v. Associated Transp. Inc., 330 F.2d 706, 711 (6th Cir. 1964); Podolsky v. LaForge, 92 F.2d 954, 958 (1st Cir. 1937).

[69] *Cf.* Georgia S. & F. Ry. v. Perry, 326 F.2d 921, 924 (5th Cir. 1964) (posed photograph admissible when shown to be a correct representation of the scene, object, or person it purports to represent); Niles v. Sanders, 218 So. 2d 428, 432 (Miss. 1969) (construction of tableaux for purpose of reenacting incident, to be photographed and offered in evidence in jury trial, is ordinarily improper); Buie v. State, 217 Miss. 695, 698-99, 64 So. 2d 897, 898 (1953) (photograph properly excluded when there was a dispute over the relative positions of the defendant and deceased and photograph showed defendant standing at alleged spot where deceased stood at time of shooting); Martin v. State, 217 Miss. 506, 512-13, 64 So. 2d 629, 631 (1953) (when position at time of shooting was in dispute, it was error to admit posed photograph showing sheriff standing where state alleged the defendant stood); Brett v. State, 94 Miss. 669, 672-74, 47 So. 781, 782 (1914) (error to admit photograph of one party's reconstruction of position when such position was in dispute); Fore v. State, 75 Miss. 727, 738, 23 So. 710, 712 (1898) (error to permit introduction of photographic representations of tableaux vivants, carefully arranged to exhibit the scene according to the proponent's account since photographs were not merely pictorial representations of the scene but rather were "artistic reproductions of situations carefully planned by the state's chief witness").

[70] May v. State, 199 So. 2d 635, 640 (Miss. 1967); *accord,* Buie v. State, 217 Miss. 694, 698-99, 64 So. 2d 897, 898 (1953).

The admissibility of enlarged photographs has been recognized by the federal courts.[71] In accordance with the state rule that a photograph may be sufficiently authenticated by a person testifying that it accurately depicts the scene shown therein,[72] there should be no problem in Mississippi courts with offering into evidence an enlargement of an original photograph when testimony supporting accuracy can be obtained. Of course, the enlargement must not distort the relative size of the objects shown.

Finally, the federal courts have recognized the admissibility of altered photographs when the alteration is clearly explained to the trier of fact and when the alteration serves to make the photograph more accurate. In *Colley v. Standard Oil Co.*,[73] the Fourth Circuit Court of Appeals held that a photograph of the location of a train-truck collision showing the view approaching the railroad crossing was admissible, even though the photograph had been altered to eliminate the location of a store that had been destroyed by a fire caused by the collision.[74] The court held that under the circumstances the altered photograph was a more accurate portrayal of the view of the crossing on the day of the collision.

Maps, diagrams, drawings, and charts are also admissible upon a showing that they accurately reflect the information depicted.[75] Accuracy in this instance, however, does not require that the evidence be drawn to scale or by a professional if the lack of exactitude is clearly announced to the jury and the document accurately reflects the information in some relevant particular.[76] For example, in the case of an arson prosecution, a rough hand drawing of the floor plan of a burned house could be used to show the progression of the fire as long as it accurately reflected the relationship and positions of the rooms. As with photographs and movies, someone other than the drafter of the map, diagram, drawing, or chart may testify to its accuracy if he has knowledge of the matter represented.[77] The sufficiency of the authentication is again left to the discretion of the trial court.[78]

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[71] *E.g.*, United States v. Currier, 454 F.2d 835, 838-39 (1st Cir. 1972); United States v. Parhms, 424 F.2d 152, 157 (9th Cir.), *cert. denied*, 400 U.S. 846 (1970); Urban v. United States, 237 F.2d 379, 390 (9th Cir. 1956). *See also* Annot., 72 A.L.R.2d 308 (1960).

[72] See note 59 and accompanying text *supra*.

[73] 157 F.2d 1007 (4th Cir. 1946).

[74] *Id.* at 1009.

[75] *E.g.*, Rhoads v. Virginia-Florida Corp., 476 F.2d 82, 86 (5th Cir. 1973); Vergott v. Desert Pharmaceutical Co., 463 F.2d 12, 17 (5th Cir. 1972); Brinegar v. San Ore Constr. Co., 302 F. Supp. 630, 640 (E.D. Ark. 1969); Crawford v. City of Meridian, 186 So. 2d 250, 252 (Miss. 1966); Baggett v. State, 219 Miss. 583, 592, 69 So. 2d 389, 393 (1954); Lackey v. State, 215 Miss. 57, 64, 60 So. 2d 503, 505 (1952).

[76] *E.g.*, United States v. Jordano, 521 F.2d 695, 698 (2d Cir. 1975); Mississippi Rd. Supply Co. v. Baker, 199 So. 2d 820, 823 (Miss. 1967); King v. State, 251 Miss. 161, 173, 168 So. 2d 637, 641 (1964); Illinois Cent. R.R. v. Coussens, 223 Miss. 103, 119, 77 So. 2d 818, 823-24 (1955).

Rule 901(b)(2). Nonexpert Opinion on Handwriting[79]

A lay person may acquire sufficient familiarity with the handwriting of another person to be qualified to give his opinion on the authorship of a particular document. Such familiarity may be gained by seeing the other person write, by exchanging correspondence with that person, or by any other means that affords a reasonable basis upon which to identify the other person's signature on subsequent occasions.[80] It should be noted that this illustration specifically excludes familiarity acquired for purposes of litigation, which must be left to expert testimony.[81] Mississippi's recognition of the propriety of nonexpert opinion authentication of handwriting is illustrated by the *Wiggins v. State* decision.[82] In *Wiggins*, the sister of the deceased was permitted to identify handwriting in a letter found in the possession of the deceased as that of the defendant, based upon the sister's familiarity with the defendant's handwriting even though there was no signature on the letter.[83]

Neither the federal rules nor any Mississippi authority enunciates specific criteria to be used in evaluating the sufficiency of a nonexpert's familiarity with a given writing. It appears that a witness' statement of familiarity will suffice to admit the writing, and the extent of experience upon which this alleged knowledge is based becomes a question of weight for the trier of fact.[84]

When there is any real question as to the authorship of a handwritten document, the authors suggest that nonexpert opinion authentication should be used only if there is no practical alternative and then only after exhaustive preparation of the witness for intensive cross-examination. Aggressive cross-examination of a nonexpert witness' identification of a signature will often destroy both the probative value of the authentication and the credibility of the witness. Questions that should be propounded to the nonexpert witness on cross-examination include inquiry into the witness' extent of familiarity with the handwriting in question, the witness' training and experience in identifying handwritings and signatures, and whether the witness would rely on the signatures he identified in an ordinary business transaction. Additionally, if the cross-examiner has a substantial basis upon which to question the witness' ability to identify the handwriting or signature, he may require the witness to select genuine specimens from a group which include artfully drawn forgeries.[85] If the witness selects a forgery or is unable to select from among the specimens, his testimony will have been effectively discredited. Although the cross-examiner risks the substantial favorable impact that a correct selection would have upon the jury, the authors submit that artfully drawn forgeries will stump a nonexpert most of the time.

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[77] *E.g.*, Rhoads v. Virginia-Florida Corp., 476 F.2d 82, 86 (5th Cir. 1973); Brinegar v. San Ore Constr. Co., 302 F. Supp. 630, 640 (E.D. Ark. 1969); Crawford v. City of Meridian, 186 So. 2d 250, 252 (Miss. 1966).

[78] *E.g.*, United States v. Diez, 515 F.2d 892, 905 (5th Cir.), *cert. denied*, 423 U.S. 1052 (1975); United States v. Brickey, 426 F.2d 680, 687 (8th Cir.), *cert. denied*, 400 U.S. 828 (1970); Mississippi Rd. Supply Co. v. Baker, 199 So. 2d 820, 823 (Miss. 1967); Baggett v. State, 219 Miss. 583, 593, 69 So. 2d 389, 393 (1954).

[79] See note 16 *supra*; Criminal Law 🔑 444, 452(4); Evidence 🔑 474(14).

[80] FED. R. EVID. 901(b)(2), Advisory Comm. Note.

[81] *Id.*

[82] 224 Miss. 414, 80 So. 2d 17 (1952).

[83] *Id.* at 422, 80 So. 2d at 19.

[84] *See In re* Goldberg, 91 F.2d 996, 997 (2d Cir. 1937) (testimony of nonexpert that he had seen defendant endorse three checks and the signatures in question were by the same person held admissible); Wiggins v. State, 224 Miss. 414, 422, 80 So. 2d 18, 19 (1955) (lay witness who testified she was familiar with defendant's handwriting allowed to authenticate letter).

When the attorney intends to authenticate a signature or writing through the person who signed or wrote the document in question and such person is either an adverse party or unfriendly witness, it might be wise to prepare an alternative method of authentication as protection against the possibility that the witness cannot or will not admit authorship. The need to be ready with alternative proof is best exemplified by *Anderson v. Sills*.[86] When asked by defendant's counsel about the execution of a prior inconsistent signed statement, the plaintiff's husband responded that the signature on the statement looked like his but he could not remember the things it contained.[87] When defendant's counsel subsequently attempted to introduce the statement into evidence, plaintiff's objection was sustained on the basis that the document had not been properly authenticated.[88] If the handwriting is denied and its proponent proves the signature by an alternative means, the credibility of the adverse party or witness will, of course, be destroyed.

Although *Anderson* illustrates the need for alternative proof when authentication is initially sought from an adverse witness, the authors feel that the *Anderson* result is too harsh in light of the theory behind the authentication rule. All that should be required is the introduction of preliminary evidence sufficient to permit a juror to determine that the item in question is what it purports to be.[89] The trier of fact then decides what probative force to attach to the document after it and all other evidence has been admitted.[90] A witness' testimony that "it looks like his signature" should be sufficient to authenticate the document under rule 901(b)(2).

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[85] 5 Weinstein's Evidence ¶ 901(b)(2)[01], at 901-29 (1976).

[86] 242 Miss. 238, 134 So. 2d 482 (1961).

[87] *Id.* at 244-45, 134 So. 2d at 484.

[88] *Id.*

[89] 5 Weinstein's Evidence ¶ 901(a)[01], at 901-16 (1976).

Rule 901(b)(3). Comparison by Trier or Expert Witness[91]

Illustration (3) connotes that all comparison situations, including handwriting specimens, are to be treated similarly. Examples of these comparisons include: identifying fingerprints taken at the scene of a crime as those of a defendant by comparing them with defendant's fingerprints on record; identifying a revolver used in a murder by comparing the marks in the bore of the revolver in question with those on the bullet extracted from the deceased; authenticating a questioned writing by comparing it with another writing known to be by the alleged author of the questioned writing; authenticating a typed document by comparing it with the machine on which it was allegedly typed; authenticating tire tread marks taken from the scene of a crime by comparing them with the tread marks of a suspected automobile.[92] Likewise, shoe prints, hair, blood, and the like can be identified through comparison. Authentication or identification of each of these items of evidence depends upon a statistical demonstration or assumption that the markings or other identifying characteristics are so unique that it is likely they had the same source.[93]

The two elements of authentication by comparison are the introduction into evidence of a specimen whose source is known and properly authenticated and the presence at trial of a person competent to conduct the comparison.[94] The comparison method of authentication is consistent with the Federal Business Records Act, which provides that "[t]he admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."[95] Additionally, prior federal case law holds that the jury may conduct its own handwriting comparison independently of the testimony of handwriting experts.[96] It has also long been the Mississippi rule that genuine writings are admissible for purposes of comparison with disputed writings "either by witnesses on the stand or by the jury without the intervention of the witness."[97]

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[90] See note 12 and accompanying text *supra.*

[91] See note 16 *supra*; Criminal Law 🔑 404(5), 444; Evidence 🔑 197-98, 561-67, 573.

[92] *See* 5 Weinstein's Evidence ¶ 901(b)(3)[01], at 901-30 (1976). In Willoughby v. State, 154 Miss. 653, 122 So. 757 (1929), the court, in discussing the comparison of fingerprints, noted:

> The evidence of finger print identification has, for a long time, been recognized by the courts of the country as admissible in evidence in order to establish the identity of a party where the comparison of a developed finger print with that of the party alleged to have made it is shown . . . .

Id. at 659, 122 So. at 759; *cf.* Hartzell v. United States, 72 F.2d 569, 583 (8th Cir.) (comparison of typewriting), *cert. denied,* 293 U.S. 621 (1934).

[93] 5 Weinstein's Evidence ¶ 901(b)(3)[01], at 901-30 (1976).

[94] *Id.*

Since the jury may conduct its own independent handwriting comparison, the attorney eliciting the direct testimony of the expert should develop completely the expert's background, training, skill, the manner in which the expert conducted the comparison, and the expert's reasons for reaching his opinion. This foundation testimony is important since it determines the weight the trier of fact will give to the expert's opinion.[98] The expert's opinion can best be explained through the use of demonstrative evidence to illustrate that aspect of the handwriting or signature that he considers most significant in reaching his opinion. Therefore, the attorney offering the expert should use photographic copies, including enlargements, of the handwriting exemplar at issue. In this way the expert can point out those specific aspects of the handwriting in question that convince him it is in fact that of the person claimed.[99]

As with the lay opinion, the expert opinion on handwriting identification may be tested by having the expert choose the authentic from among several specimens of the handwriting or signature in question. The authors believe that this test should be used to cross-examine experts only where there is virtual certainty that the handwriting expert is incompetent since success in separating the genuine from the false specimens will probably be conclusive as to expertise in the eyes of the jury. Otherwise, the cross-examiner should attack an expert's experience and methodology. When the proponent suspects his expert may have difficulty separating the specimens, the expert should be instructed to describe the equipment necessary to make an accurate analysis of a particular handwriting or signature and to state that because of the unavailability of this equipment such an analysis cannot be made in the courtroom.[100]

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[95] 28 U.S.C. § 1731 (1970).

[96] *E.g.*, United States v. Woodson, 526 F.2d 550, 551 (9th Cir. 1975); Strauss v. United States, 311 F.2d 926, 932 (5th Cir.), *cert. denied*, 373 U.S. 901 (1963).

[97] Harrison v. Eagle Lumber & Supply Co., 152 Miss. 466, 475, 119 So. 203, 205 (1928).

[98] *E.g.*, Clark v. Lansford, 191 So. 2d 123, 125 (Miss. 1966).

[99] *See, e.g.*, United States v. Currier, 454 F.2d 835, 838-39 (1st Cir. 1972) (in embezzlement prosecution, enlarged infrared photograph and regular photograph of erased portion of defendant bank teller's statement sheet were admissible when those exhibits were verified by handwriting expert who testified that photographs were made at his direction and they represented his observations); United States v. Marshall, 431 F.2d 944, 945 (5th Cir. 1970) (photographic excerpts of handwriting permitted).

Under both the Mississippi and federal procedures, the writing intended to be used for comparison purposes must itself be authenticated.[101] Any signature or handwriting that can be authenticated by any method available under rule 901(a) may be admitted as a specimen for comparison purposes under rule 901(b)(3).[102]

Rule 901(b)(4). Distinctive Characteristics and the Like[103]

Rule 901(b)(4) recognizes that an item may possess such distinctive qualities that it identifies its source. For example, a writing may identify its source by contents, internal words and thought patterns, its relationship to other writings or transactions, or its appearance or physical characteristics.[104] Letters, cablegrams, and telegrams may be authenticated "where the contents reveal a knowledge or other trait peculiarly referable to a single person."[105] The contents of a writing, however, should not be required to reflect that only the alleged author would have known the details contained therein. Rather, the requirements of rule 901(a) should be satisfied where the contents support a finding that the matter in question is what its proponent claims.[106]

A writing may be authenticated when its internal words or thought patterns are particularly characteristic of the purported author. This type of analysis is the subject of a science known as psycholinguistics, the study of the relationship between messages and the characteristics of the person sending the messages.[107] Psycholinguistics "is a matching of communication style and personality. Investigators of writing style, for example, look to the 'length, type, and distribution of sentences, relative frequency of imagery, word length and extent of vocabulary.' "[108] These variables are often used to educe "some evidence of idiosyncratic characteristics of writers."[109]

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[100] *See* 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(3)[03], at 901-36 (1976).

[101] *E.g.*, United States v. Wagner, 475 F.2d 121, 123 (10th Cir. 1973); Harrison v. Eagle Lumber & Supply Co., 152 Miss. 466, 475, 119 So. 203, 205 (1928).

[102] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(3)[03], at 901-36 (1976).

[103] See note 16 *supra*; Criminal Law 🔑 427; Evidence 🔑 148, 378.

[104] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(4)[01], at 901-46 (1976); *see, e.g.*, United States v. Wilson, 532 F.2d 641, 645 (8th Cir. 1976) (when writings are such that only persons acquainted with a particular transaction could have written them, the authenticity of such writings as evidence is considered more reliable).

[105] United States v. Sutton, 426 F.2d 1202, 1207 (D.C. Cir. 1969) (quoting 7 J. WIGMORE, *supra* note 7, § 2148).

[106] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(4)[01], at 901-47 (1976).

[107] *Id.* at 901-55.

[108] *Id.*

[109] *Id. See generally* Arens & Meadow, *Psycholinguistics and the Confession Dilemma*, 56 COLUM. L. REV. 19, 25 (1956).

Older cases hold that a letterhead alone does not authenticate a letter. However, a letterhead may be sufficient authentication under the federal rules when it is shown that the letterhead would not normally be available to anyone but the sender, when the letterhead corresponds to the one generally used by the sender, and when the typing and form of the letter corresponds to the usual practice employed in the purported sender's office.[110]

A writing may also be authenticated when it is shown the circumstances surrounding the letter or conversation fit within, and conform to, other authenticated conduct on the part of the alleged declarant during the relevant time period. For example, when letters fit into a course of correspondence or progressive course of action, preliminary proof of the letters' relationship to these events will authenticate them.[111] This method of authentication is most frequently encountered with reply letters. "[A] letter received in due course through the mails in response to a letter sent by the receiver is presumed to be the letter of the person whose name is signed to it."[112] To authenticate a writing as a reply requires that proof be adduced to show the first letter was actually sent,[113] which requirement is met by the sender's testimony that he in fact sent the first letter.[114]

Similarly, a telephone call alleged to have been made by a particular person may be authenticated by circumstantial evidence[115] that establishes it was improbable anyone other than the particular person was the caller.[116] More specifically, circumstantial evidence that will suffice to prove the identity of the caller is within the discretion of the court[117] and may include, but is not limited to: (1) a record showing that the person purported to have called had a telephone, that the call was in fact made from that telephone at the time in question, and that the caller identified himself;[118] (2) the giving of directions that prove to be correct, or the reference to the subject of some previous conversation between the parties;[119] (3) the use of nicknames, unknown pseudonyms, or agreed upon signals;[120] (4) recognition of the voice by the witness as contemplated in rule 901(b)(5);[121] (5) evidence of circumstances outside the telephone conversation that corroborate the self-identification of the alleged caller made during the conversation;[122] (6) a showing that the subject telephone conversation was a reply to a previous communication, using the same criteria as for authentication of a reply letter.[123]

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[110] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(4)[02], at 901-53 (1976).

[111] *See, e.g.,* United States v. Wilson, 532 F.2d 641, 645 (8th Cir. 1976) (genuineness of writing may be established by circumstantial evidence); United States v. Sutton, 426 F.2d 1202, 1207-08 (D.C. Cir. 1969) (note suggesting defendant's plan for murder-suicide held authenticated when subsequent events observed by eyewitnesses followed note's predictions); Rice v. United States, 251 F. 778, 783 (1st Cir.) (threatening letters admitted into evidence after testimony of the addressee that they were successive steps in a scheme by defendant to defraud the addressee when the scheme was initiated with a letter bearing a blackmail threat which was found in defendant's possession), *cert. denied,* 281 U.S. 730 (1930). *See also* Annot., 9 A.L.R. 984 (1920) (discussion of requirements of proof of authenticity of letters other than through proof of handwriting or typewriting).

[112] United States v. Wolfson, 322 F. Supp. 798, 812 (D. Del.), *aff'd,* 454 F.2d 60 (3d Cir. 1971), *cert. denied,* 406 U.S. 924 (1972); *accord,* Scofield v. Parlin & Orendorff Co., 61 F. 804, 806 (7th Cir. 1894).

[113] *E.g.,* Purer & Co. v. Aktiebolaget Addo, 410 F.2d 871, 876 (9th Cir.), *cert. denied,* 396 U.S. 834 (1969); Consolidated Grocery Co. v. Hammond, 175 F. 641, 645 (5th Cir. 1910); United States v. Wolfson, 322 F. Supp. 798, 812 (D. Del. 1971), *aff'd,* 454 F.2d 60 (3d Cir.), *cert. denied,* 406 U.S. 924 (1972).

[114] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(4)[05], at 901-60 (1976). The same rules apply with regard to telegrams. For an extensive discussion of admissibility of telegrams, see Annot., 5 A.L.R.3d 1018 (1966).

[115] FED. R. EVID. 901(b)(4), Advisory Comm. Note.

[116] Zuch v. Hussey, 366 F. Supp. 553, 558 (E.D. Mich. 1973).

Although there appears to be no Mississippi case dealing specifically with the distinctive characteristic technique of authentication, it is submitted that the Mississippi courts should recognize this method of authentication since this illustration follows the common law rule.[124]

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[117] United States v. Johnston, 318 F.2d 288, 292 (6th Cir. 1963); Zuch v. Hussey, 366 F. Supp. 553, 558 (E.D. Mich. 1973).

[118] *E.g.*, United States v. Ross, 321 F.2d 61, 69-70 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963); *cf.* Robilio v. United States, 291 F. 975, 983 (6th Cir.) (fact that caller identified himself is insufficient unless accompanied by other evidence), *cert. denied*, 263 U.S. 716 (1923).

[119] United States v. Benjamin, 328 F.2d 854, 861 n.3 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

[120] *E.g.*, United States v. Frankel, 65 F.2d 285, 287 (2d Cir.), *cert. denied*, 290 U.S. 682 (1933).

[121] *See, e.g.*, United States v. Turner, 423 F.2d 481, 484 (7th Cir.) (that witness had talked with the defendant numerous times by telephone and at least once in person on the day before the telephone conversation in question, was sufficient familiarity to identify the defendant's voice), *cert. denied*, 398 U.S. 967 (1970); United States v. McCartney, 264 F.2d 628, 631 (7th Cir.) (witness heard defendant speak in person a few hours after the call in question), *cert. denied*, 361 U.S. 845 (1959).

[122] *See, e.g.*, Andrews v. United States, 78 F.2d 274, 275 (10th Cir. 1935) (telephone company records admitted which showed that defendant had paid for calls emanating from his number; other evidence in the form of correspondence admitted which showed defendant was knowledgeable of the subject matter of the calls); Dolff v. United States, 61 F.2d 881, 884-85 (7th Cir. 1932) (the fact that defendant paid for calls charged to his telephone was evidence that person placing the calls was the defendant), *cert. denied*, 289 U.S. 763 (1933).

[123] *E.g.*, Van Riper v. United States, 13 F.2d 961, 968 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926). In *Van Riper*, Judge Learned Hand stated:

> If, for example, a man were to write a letter, properly addressed to another, and were to receive a telephone call in answer, professing to come from the addressee, and showing acquaintance with the contents of the letter, it would in our judgment be a good enough identification of the speaker to allow in the proof, though in the end, of course, the issue of identity would be for the jury. This is the reasoning on which a complete correspondence is admitted, once its origin is established, so long as it continues to be consecutive in substance.

13 F.2d at 968. See notes 110 through 114 and accompanying text *supra*.

Rule 901(b)(5). Voice Identification[125]

"[T]he requisite familiarity required to authenticate a voice may be acquired either before or after the particular speaking which is the subject of the identification . . . ."[126] While an expert might be used to identify a voice by its own "print,"[127] identification will most often be by lay witness. It is not necessary that a lay witness be absolutely positive about his identification of a voice. In *Auerbach v. United States*,[128] the court held that a witness' voice identification was admissible even though the witness qualified his testimony as being to the best of his belief and allowed for the possibility that he might have been mistaken.[129]

Taped sound recordings are also admissible upon proper foundation evidence when testimony about the conversation itself is probative since such tape recordings corroborate the oral testimony.[130] More rigorous authentication requirements are placed upon tape recordings, however, because they are not readily identifiable as the original version and are peculiarly susceptible to alteration, tampering, and selective editing.[131]

Although no uniform rule for authentication of tape recordings has been announced, the following elements of foundation proof, which should be made outside of the presence of the jury,[132] are appropriate:

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[124] See note 19 *supra*.

[125] See note 16 *supra*; Criminal Law 🔑 438; Evidence 🔑 148, 359(5), 380.

[126] FED. R. EVID. 901(b)(5), Advisory Comm. Note; *accord*, United States v. Kirk, 534 F.2d 1262, 1277 (8th Cir. 1976), *cert. denied*, 98 S. Ct. 276 (1977); United States v. McMillan, 508 F.2d 101, 105 (8th Cir.), *cert. denied*, 421 U.S. 916 (1974); United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974).

[127] There is currently some controversy over the admissibility of voice identifications by expert analysis of voice prints. In United States v. Addison, 498 F.2d 741, 745 (D.C. Cir. 1974), the court held that spectrographic identification of the defendant as the maker of a telephone call was not sufficiently accepted by the scientific community in that jurisdiction to form a basis for the jury's determination of guilt or innocence and was therefore inadmissible. In United States v. Jenkins, 525 F.2d 819 (6th Cir. 1975), however, the court held that a voice print identification made by a member of the state police was admissible when the witness compared voice prints derived from tape recordings of an unknown speaker with voice prints derived from a taped voice exemplar given by the defendant. *Id.* at 827. The required foundation was properly laid, and the officer's background and training, as well as the accuracy of the voice print method of analysis, were subjected to detailed scrutiny on lengthy direct and rigorous cross-examinations. *Id.*

[128] 136 F.2d 882 (6th Cir. 1943).

[129] *Id.* at 885.

[130] Nixon v. Sirica, 487 F.2d 700, 718 (D.C. Cir. 1973).

[131] *See generally* Annot., 58 A.L.R.2d 1024 (1958) (discussing the requirements for the admissibility of sound recordings).

> (1) That the recording device was capable of taping the conversation now offered in evidence. (2) That the operator of the device was competent to operate the device. (3) That the recording is authentic and correct. (4) That changes, additions or deletions have not been made in the recording. (5) That the recording has been preserved in a manner that is shown to the court. (6) That the speakers are identified. (7) That [in criminal cases] the conversation elicited was made voluntarily and in good faith, without any kind of inducement.[133]

Proof of these seven elements should authenticate a tape recording even in a criminal case when the burden is upon the government to produce clear and convincing foundation evidence of authenticity and accuracy.[134]

The admissibility of an otherwise acceptable recording is not destroyed because of partial inaudibility, deletion, or erasure when it is shown that the parts that can be heard and the record as a whole are trustworthy.[135] The theory for such permissive admission is premised upon the realization that partial inaudibility in a recording is no different than testimony about a conversation only partially overheard.[136] Again, as with other areas of authentication, the trial court must decide whether the proof of accuracy and probity is sufficient.[137]

A voice on a tape recording may be authenticated by persons other than the participants in the recorded conversation if testimony is first given that the witness was familiar with the voices of all speakers that can be heard on the recording.[138] When original recordings are hard to understand because of technical defects, rerecordings might be more beneficial to the trier of fact. Rerecordings are admissible if authenticated as accurate reproductions of the conversation originally recorded.[139] Foundation proof here should include the previously discussed elements plus additional proof of the rerecording's accuracy.[140] Finally, videotapes are also admissible upon a proper foundation that they accurately depict the events and persons recorded.[141] The authors suggest use of the elements of authentication enumerated above for sound recordings.

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[132] United States v. McKeever, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959).

[133] 169 F. Supp. at 430; *accord*, McKeeman v. Commercial Credit Equip. Corp., 320 F. Supp. 938, 945-46 (D. Neb. 1970).

[134] *E.g.*, United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1965).

[135] *E.g.*, United States v. Maxwell, 383 F.2d 437, 442 (2d Cir. 1967), *cert. denied*, 389 U.S. 1957 (1968); United States v. Knohl, 379 F.2d 427, 439 n.8 (2d Cir.), *cert. denied*, 420 U.S. 172 (1967); Addison v. United States, 317 F.2d 808, 815 (5th Cir. 1963), *cert. denied*, 376 U.S. 905 (1964).

[136] Monroe v. United States, 234 F.2d 49, 54-55 (D.C. Cir.), *cert. denied*, 352 U.S. 873 (1956); *see* United States v. Enten, 329 F. Supp. 307, 309 (D.D.C. 1971), *vacated in part on other grounds sub nom.* United States v. Lemonakis, 485 F.2d 941 (8th Cir. 1973).

[137] *E.g.*, United States v. Lane, 514 F.2d 22, 27 (9th Cir. 1975); United States v. Howard, 504 F.2d 1281, 1287 (8th Cir. 1974).

[138] United States v. Cosby, 500 F.2d 405, 406 (9th Cir. 1974); United States v. Bonanno, 487 F.2d 654, 659 (2d Cir. 1973).

Mississippi procedure accords with the federal rule in dealing with the requisites of voice identification. In *Hurst v. State*,[142] the Mississippi Supreme Court specifically noted that identification of a person by voice is competent in both criminal and civil cases.[143] As with the federal rule, this identification can be made either before or after the conversation at issue.[144] Mississippi has also recognized the propriety of voice identification through the use of sound recordings. Because of the ease with which a tape recording can be edited, parts erased or deleted, and portions rerecorded, preliminary proof of the authenticity and accuracy of the tape recording is required in state courts just as in federal courts.[145] Additionally, the elements of proof[146] previously mentioned must be met.[147]

Rule 901(b)(6). Telephone Conversations[148]

Rule 901(b)(6) provides for authentication of personal and business telephone conversations.[149] This illustration deals solely with identification of the voice of the person called, not the person making the call, and consequently, it does not alter the established rule that the caller's self-identification, without more, does not authenticate a telephone conversation.[150] It does recognize, however, that self-identification of the person called is sufficient authentication of the call so long as he was called at the telephone number at which he could normally be reached.[151] Beyond proof of placing a call to a number listed for the person called, that person's voice can be identified either through the testimony of a witness who knows the voice, or through distinctive characteristics in the voice, in the pattern of speech, or in the subject matter discussed.[152] Thus, as with the case of voice identification, it is not objectionable that the person testifying to the telephone conversation and identifying the alleged participant was not himself a participant, but rather was a bystander, eavesdropper, or wiretapper.[153]

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[139] Johns v. United States, 323 F.2d 421, 421 (5th Cir. 1973) (per curiam); Fountain v. United States, 384 F.2d 624, 631 n.8 (5th Cir.), *cert. denied*, 390 U.S. 1005 (1967).

[140] *See* United States v. Madda, 345 F.2d 400, 403 (7th Cir. 1965) (rerecording by sound engineer admissible when engineer testified that nothing had been deleted from the original and no sound had been dubbed in).

[141] *E.g.*, Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972).

[142] 240 So. 2d 273 (Miss. 1970).

[143] *Id.* at 276.

[144] *See id.* at 277 (person identified obscene caller by subsequent telephone conversation after the caller was arrested); Pickett v. State, 164 Miss. 142, 148, 144 So. 552, 553 (1932) (witness positively identified robber's voice the day after robbery).

[145] *Cf.* Carr v. State, 218 So. 2d 737, 739 (Miss. 1969) (transcript of tape recording inadmissible when stenographer admitted that portions of the tape were unintelligible and when she did not recognize the voices).

[146] See note 133 and accompanying text *supra*.

[147] *See, e.g.*, Haynes v. Avco Security Corp., 299 So. 2d 198, 200-01 (Miss. 1974) (authenticity of tape recording must be shown by proponent; tape is admissible after showing the manner of preparation and preservation and absence of changes); Ray v. State, 213 Miss. 650, 656-57, 57 So. 2d 469, 471-72 (1952) (recording sufficiently authenticated when the testimony showed that the tape recorder was capable of recording the conversation, the manner of presentation, and the accuracy of the recording).

[148] See note 16 *supra*.

[149] Radio transmissions and television broadcasts can also be authenticated in the same manner as telephone calls, with the additional factor that, with television broadcasts, visual as well as oral identification will be possible. 5 WEINSTEIN'S EVIDENCE ¶

The rule further assumes that a call made to a business at a number assigned to the business by the telephone company will in fact reach the business if answered. This assumption is based on Professor Wigmore's mercantile custom theory, which holds that ordinarily telephone numbers correspond to names and addresses stated in directories, that connection will be made with the number dialed, that the person called will answer, and that the person who answers and conducts the negotiations is authorized to do so.[154]

Mississippi authentication procedure also follows mercantile custom with regard to business telephone conversations. In *Weagley v. Colonial Baking Co.*,[155] the Mississippi Supreme Court held that it was error not to admit testimony of telephone conversations with persons who answered the calls and identified themselves as managers and authoritative employees of defendant corporations and partnerships.[156]

901(b)(6)[03], at 901-90 to -91 (1976). There are two requirements for authentication of radio transmissions or television broadcasts: (1) proof that the transmitter or the television was capable of communicating sound accurately and (2) proof of the identity of the alleged speaker. *Id.* at 901-90.

[150] *E.g.*, United States v. Benjamin, 328 F.2d 854, 861 n.3 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

[151] *E.g.*, United States v. Register, 496 F.2d 1072, 1077 (5th Cir.), *cert. denied*, 419 U.S. 1120 (1974); United States v. Cox, 449 F.2d 679, 689 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

[152] FED. R. EVID. 901(b)(5), Advisory Comm. Note. See notes 115 through 123 & 126 through 129 and accompanying text *supra*.

[153] *See, e.g.*, United States v. Bucur, 194 F.2d 297, 303-04 (7th Cir. 1952) (testimony of codefendant who listened to only one side of conversation was admissible where supported by sufficient circumstantial evidence). See note 138 and accompanying text *supra*.

[154] 7 J. WIGMORE, *supra* note 7, § 2155(1)(d), at 617-18.

[155] 208 Miss. 815, 45 So. 2d 717 (1950).

[156] *Id.* at 855-56, 45 So. 2d at 725.

Evidence that the call was to a business number, coupled with additional evidence that the person answering stated his position with the business, created a presumption the person answering was in fact who he represented himself to be.[157] Thus, it appears that Mississippi's mercantile custom doctrine adds to the criteria of the federal rule the requirement that the party called identify himself as an employee of the business. This interpretation of Mississippi's position is supported by a later decision. In *Acosta v. State*,[158] the court held that testimony concerning the telephone conversation at issue was inadmissible when the proponent testified he called the defendant's business office and someone whose identity he did not know gave him the information upon which the suit was brought. The proponent further testified that he had never been in the defendant's office, that he knew no one who worked there, and that he had never seen the defendant until the trial.[159]

Rule 901(b)(7). Public Records or Reports[160]

The verity which attaches to documents required to be filed in a public office[161] permits authentication on the basis of public custody without requiring proof of the documents' accuracy. This faith in official records is based upon the assumption that a person in an official capacity can reasonably be relied upon to perform his task with objectivity. Furthermore, falsification of public documents constitutes a violation of law for which criminal sanctions could be imposed on either a public official or a private person required by law to file such a report.[162]

Authentication of public documents requires a prima facie showing that the document offered is a public record from a public office where such items are kept.[163] This doctrine of custodial authentication applies not only to reports made by persons who are themselves public officials, but also to any writing prepared by private persons charged by law with the duty to prepare and file such information in public offices. Included would be tax returns, selective service files, weather bureau reports, patent office records, military records, immigration records, and other official records of a state, federal, local, or other public office.[164] The term "public records" also includes acts of legislatures, judicial records, and reports of administrative offices.[165] The authors submit that the rule 901(b)(7) method of authentication contemplates introduction of the original record or report after extrinsic proof of official custody has been offered through oral testimony since the original under seal would be covered by rule 902(1) and a certified copy would be covered by rule 902(4).

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[157] *Id.*

[158] 222 Miss. 426, 76 So. 2d 211 (1954).

[159] *Id.* at 426-27, 76 So. 2d at 211.

[160] *See* note 16 *supra*; Evidence 🔑325-37, 366.

[161] 7 J. WIGMORE, *supra* note 7, §§ 2158, 2159; *see, e.g.*, Kenney v. United States, 254 F. 262, 264 (5th Cir. 1918) (there is an underlying presumption that public records maintained in public offices are correct), *cert. denied*, 249 U.S. 600 (1919). The custodial proof method of authentication for public documents also includes data stored in computers or other similar electronic systems. FED. R. EVID. 901(b)(7), Advisory Comm. Note.

[162] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(7)[01], at 901-92 (1976).

[163] *Id.* at 901-94. It is not necessary that the person who submits a public record be the person authorized by law to keep such record so long as proof is offered to show that the record is from an authorized public office. Similarly, it is not necessary that the custodian testifying to such document be able to authenticate its accuracy upon personal knowledge. *Id.* at 901-97.

Mississippi's authentication procedure accords with the federal rule and permits a record produced in court and identified by the custodian to be admitted without further proof of authenticity.[166]

Rule 901(b)(8). Ancient Documents or Data Compilation[167]

Rule 901(b)(8) adopts the ancient document rule and extends it to include data stored electronically or by other similar means.[168] The three prerequisites to authentication are form,[169] location,[170] and age.[171] Since the importance of appearance necessarily diminishes when dealing with data stored electronically or by other similar means, the importance of custody and of storage at a proper location increases inversely.[172]

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[164] *Id.*

[165] *Id.* at 901-95.

[166] *E.g.*, Simmons v. Town of Louin, 213 Miss. 482, 490-91, 57 So. 2d 133, 136 (1952); Albrecht v. State, 62 Miss. 516, 523 (1885); *cf.* Hand & Huddleston v. Grant, 13 Miss. (5 S. & M.) 508, 513 (1845) (memorandum book of sales kept by sheriff is not admissible on his behalf in action to recover price of real estate he sold under execution when such book was not a public record).

[167] See note 16 *supra*; Evidence 🔑 372.

[168] Fed. R. Evid. 901(b)(8), Advisory Comm. Note.

[169] *See, e.g.*, Stewart Oil Co. v. Sohio Petroleum Co., 202 F. Supp. 952, 957-58 (E.D. Ill. 1962) (document that varied greatly from other similar documents indicated fraud and was ruled inadmissible), *aff'd*, 315 F.2d 759 (7th Cir.), *cert. denied*, 375 U.S. 828 (1963).

[170] *See, e.g.*, Templeton v. Luckett, 75 F. 254, 257-58 (5th Cir. 1896) ("Documents found in a place and under the care of persons where and with whom one would naturally and reasonably look for such papers are in the proper custody.").

[171] The age requirement of rule 901(b)(8) may be shown by testimony of a witness with knowledge, by expert testimony, by physical appearance, or even by the contents of the material itself when considered in light of surrounding circumstances. An example of the last method would be a reference in the document to a past event which other independent evidence shows to have occurred more than 20 years prior to the time the document is offered into evidence. 5 Weinstein's Evidence ¶ 901(b)(8)[01], at 901-98 to -101 (1976).

The federal rule reduces the period for a document to qualify as ancient from 30 years at common law to 20 under the rule, reflecting a shift in the primary theory behind the rule from recognition of the probable unavailability of witnesses to the unlikelihood of a fraud still being viable after such period. *Id.* at 901-97.

Judge Weinstein criticizes the rule because its language does not make clear to what extent various items should be included as documents or data compilations.[173] Rather, the rule should have used the term "writing or recording" as defined in rules 1001(1) and (2).[174] Despite this flaw in specificity, however, Judge Weinstein contends the rule can be interpreted to include photostats, photocopies, recordings, X-ray films, still photographs, motion pictures, and sound recordings when rules 901(b)(8), 102, and 1001(1) are read in conjunction.[175] As under other subparts of this rule, an ancient document or compilation is not automatically admissible. For instance, when the document violates other evidentiary rules such as the hearsay rule, the document will not be admitted, even though it is properly authenticated.[176]

Mississippi's age requirement conflicts with the federal; a document must have been in existence for thirty years to establish authenticity[177] rather than twenty. There is similarity, however, in the requirements for proof of custody and unquestioned nature of the document.[178] Authenticity requirements have also been applied to property questions. Possession for thirty years is presumptive evidence of the existence for that length of time of the deed purporting to convey property to the person in possession.[179] In *White v. Inman*,[180] the court held that the ancient document rule also applies to wills. Attesting witnesses need not prove a will that appears to be trustworthy if it has been filed as a public record for more than thirty years prior to probate and acknowledged before the chancery court.[181]

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[172] FED. R. EVID. 901(b)(8), Advisory Comm. Note.

[173] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(8)[01], at 901-97 (1976).

[174] *Id.* at 901-97 to -98.

[175] *Id.* at 901-98.

[176] *See, e.g.*, Town of Ninety-Six v. Southern Ry., 267 F.2d 579, 583 (4th Cir. 1959) (ancient letter excluded on ground of hearsay).

[177] *E.g.*, White v. Inman, 212 Miss. 237, 252, 54 So. 2d 375, 380 (1951); Fairly v. Fairly, 38 Miss. 280, 290 (1859); Hughes v. Wilkinson's Lessee, 37 Miss. 482, 490 (1859).

[178] *See* White v. Inman, 212 Miss. 237, 252, 54 So. 2d 375, 380 (1951) (it is not only necessary to show the document has existed for 30 years, but also that there is no question about the trustworthiness, accuracy, and validity of such document).

[179] *See* Hughes v. Wilkinson, 37 Miss. 482, 490 (1859) (deed reciting that prior purchaser had defaulted and existence and continuation of possession under deed with no adverse claim by prior purchaser for period of 30 years created a presumption that the deed was true and regular, though the power of attorney conveying it was not according to law).

[180] 212 Miss. 237, 54 So. 2d 375 (1951).

[181] *Id.* at 251, 54 So. 2d at 379-80.

Rule 901(b)(9). Process or System[182]

The nature of evidence is often questioned, and the federal rules allow authentication by proof of the reliability of the process or system producing the evidence. Examples of such resultant evidence include X-ray pictures, aural and visual recordings, computer printouts, surveys, samples, polls, electronic medical test results, and general test and experiment results. Authenticity is primarily dependent on description of the process and proof of the accuracy of the results.

A. X-rays

X-ray authentication is often critical and extensive, including some or all of the following elements:[183] (1) proof that the X-ray is a picture of the person and anatomical part or object lodged therein which it purports to be;[184] (2) proof that the condition of the person or object X-rayed was the same at the time it was taken as at the time in controversy;[185] (3) proof that the X-ray machine was dependable and operating properly at the time the pictures were taken;[186] (4) proof that the person who took the X-ray possessed the skills necessary to take a correct and accurate picture;[187] (5) proof of the manner in which the X-ray was taken;[188] and (6) proof that the X-ray was preserved without change from the time it was taken until trial.[189] The sufficiency of the authentication proof of X-ray pictures in civil cases is, as with authentication of other evidence, within the discretion of the trial court subject only to reversal upon a showing of abuse of discretion.[190] Several of the elements of proof may be judicially noticed by the court under proper circumstances,[191] and the facts of any given case may permit authentication on a less substantial basis. In all cases, however, the X-ray must be proved to be relevant, accurate, and an illustrative representation of the person's condition as it existed at the time in question.

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[182] See note 16 *supra*; Criminal Law 🔑 438; Evidence 🔑 359(1), (4), (6), 380; Federal Civil Procedure 🔑 1191.

[183] Elements of proof in the text accompanying notes 184 through 189 are noted in Annot., 5 A.L.R.3d 303 (1966).

[184] Howell v. George, 201 Miss. 783, 791, 30 So. 2d 603, 605 (1947); Gulf Research Dev. Co. v. Linder, 177 Miss. 123, 132, 170 So. 646, 648 (1936); *see* Beard v. Turritin, 173 Miss. 206, 210-11, 161 So. 688, 688-89 (1935) (X-ray picture identified by information recorded on its back). Testimony by an expert is sufficient, Wallace v. State, 203 Miss. 504, 508, 35 So. 2d 703, 704 (1948); Howell v. George, 201 Miss. 783, 791, 30 So. 2d 603, 605 (1947), as is testimony by a technician who marked the X-ray when it was taken, even though the technician cannot later identify the subject, Beard v. Turritin, 173 Miss. 206, 210, 161 So. 688, 689 (1935).

[185] Even if there has been a change in the person's condition between the time of the incident and the taking of the X-ray picture, the picture may still be admissible when any such change is sufficiently explained and the change is determined by the court not to affect the probative value or accuracy of the picture. *See, e.g.*, Wallace v. State, 203 Miss. 504, 509, 35 So. 2d 703, 704 (1948) (X-rays admissible to show path of bullet, even though victim had since died).

[186] Proof of this element should be obtained from the person who actually took the picture or from the doctor under whose supervision and in whose presence the picture was taken. Either must be knowledgeable in the function and use of X-ray machines. *See, e.g.*, Howell v. George, 201 Miss. 783, 790, 30 So. 2d 603, 605 (1947) (attending physician observed the taking of the X-ray and verified its validity).

[187] Regular employment as an X-ray machine operator suffices. *Id.*

[188] This element will be implied by the court where the X-ray has been taken in a hospital by persons who normally take X-rays. *Id.* at 791, 30 So. 2d at 605.

B. Movies

Both federal and Mississippi courts have recognized the admissibility of authenticated movies[192] whose identity, relevancy, and accuracy have been proved[193] to the court.[194] Proof of the accuracy of representation should include testimony that: (1) the movie was taken by a competent movie photographer; (2) the movie was taken with a movie camera of standard make and good condition; (3) the movie accurately reproduced the scene in question, including the speed of movement of the persons depicted; (4) the film was developed by an expert and is in the same condition as when made; (5) the movie will be shown on a screen by a projector of standard make and good condition; and (6) the projector will be operated by a competent person.[195]

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[189] *See, e.g.*, *id.* at 790, 30 So. 2d at 605 (X-ray remained in hospital unaltered until trial); Beard v. Turritin, 173 Miss. 206, 210, 161 So. 688, 689 (1935) (X-ray used at trial proved to be identical to the one taken).

[190] *E.g.*, Howell v. George, 201 Miss. 783, 791, 30 So. 2d 603, 605 (1947) (X-ray pictures properly admitted); Gulf Research Dev. Co. v. Linder, 177 Miss. 123, 132, 170 So. 646, 648 (1936) (X-ray picture not properly authenticated when there was no evidence introduced to prove the picture was correctly made by a competent person with the proper machine).

[191] In *Howell*, the court stated that it could take judicial notice of the fact that the hospital carefully preserved X-rays until called for by the party or physician. Howell v. George, 201 Miss. 783, 790, 30 So. 2d 603, 605 (1947).

[192] *See, e.g.*, Sanchez v. Denver & R.G.W.R.R., 538 F.2d 304, 306 (10th Cir. 1976) (motion pictures are admissible when premised upon foundation of relevancy, accuracy, and fairness), *cert. denied*, 429 U.S. 1042 (1977); Mikus v. United States, 433 F.2d 719, 725 (2d Cir. 1970) (a moving picture taken at the time and place of the event is entitled to be admitted on the same principles as still photographs); Mirabile v. New York Cent. R.R., 230 F.2d 498, 500 (2d Cir. 1956) (per curiam) (movie of plaintiff's activity after injury was admissible); Witt v. Merrill, 210 F.2d 132, 132 (4th Cir. 1954) (same); Barham v. Nowell, 243 Miss. 441, 448, 138 So. 2d 493, 495 (1962) (same); Metropolitan Life Ins. Co. v. Wright, 190 Miss. 53, 62-64, 199 So. 289, 290-91 (1940) (same).

[193] Barham v. Nowell, 243 Miss. 441, 448, 138 So. 2d 493, 495 (1962).

[194] *E.g.*, Alford v. New York Cent. R.R., 339 F.2d 1019, 1021 (7th Cir. 1964); Pritchard v. Downie, 326 F.2d 323, 326 (8th Cir. 1964); Butler v. Chrestman, 264 So. 2d 812, 816 (Miss. 1972); Niles v. Sanders, 218 So. 2d 428, 432 (Miss. 1969); Marr v. Nichols, 208 So. 2d 770, 773 (Miss. 1968).

[195] Barham v. Nowell, 243 Miss. 441, 448, 138 So. 2d 493, 495 (1962); Metropolitan

The federal courts have held that movies may be authenticated by someone familiar with the scene photographed, even though that person is not the photographer.[196] It appears that this is also Mississippi's position. In *Barham v. Nowell*,[197] the court pointed out that testimony about the accuracy of the movies at issue was offered by someone who accompanied the photographer as well as by the photographer himself.[198]

C. Computers

Prior to the enactment of the federal rules, the admissibility of computer business records was governed by the Federal Business Records Act.[199] Under the Act, computer records have been admitted as business records upon preliminary proof that: (1) the records were made in the regular course of business; (2) the regular course of business was to make such records contemporaneously with or within a reasonable time after the recorded transaction; and (3) the information recorded in the computer is trustworthy.[200] Additionally, the opposing party must be given an opportunity to inquire into the computer's accuracy and input procedures.[201]

The precedent-setting Mississippi rule on authentication of computer information is succinctly set forth in *King v. State ex rel. Murdock Acceptance Corp.*[202] Expressly extending the shopbook rule to conform

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Life Ins. Co. v. Wright, 190 Miss. 53, 63, 199 So. 289, 290-91 (1940). *See also* Annot., 62 A.L.R.2d 686, 692 (1958). All of these elements need not be proved in all cases. Barham v. Nowell, 243 Miss. 441, 448, 138 So. 2d 493, 495 (1962).

[196] *See* United States v. Taylor, 530 F.2d 639, 641-42 (5th Cir.) (bank camera film, taken out of presence of all bank employees, who were locked in vault during robbery, admissible when method of installation and operation of camera and proof of chain of custody shown), *cert. denied*, 429 U.S. 845 (1976); Kortz v. Guardian Life Ins. Co., 144 F.2d 676, 679 (10th Cir.) (eyewitness authenticated movie, even though he was not the photographer), *cert. denied*, 323 U.S. 728 (1944).

[197] 243 Miss. 441, 138 So. 2d 493 (1962).

[198] *Id.* at 449, 138 So. 2d at 495.

[199] 28 U.S.C. § 1732 (1970); *see* United States v. DeGeorgia, 420 F.2d 889, 893 (9th Cir. 1969) (hearsay evidence admitted under Act when recorded on a computer); D & H Auto Parts, Inc. v. Ford Mkt. Corp., 57 F.R.D. 548, 551 (E.D.N.Y. 1973) (use of computers did not affect business records under the Act).

[200] United States v. Russo, 480 F.2d 1228, 1239-40 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); D & H Auto Parts, Inc. v. Ford Mkt. Corp., 57 F.R.D. 548, 551-52 (E.D.N.Y. 1973).

[201] United States v. DeGeorgia, 420 F.2d 889, 893 n.11 (9th Cir. 1969). For outlines of basic principles, components, and functions of computers and analyses of computer-generated evidence, see Roberts, *A Practioner's Primer on Computer-Generated Evidence*, 41 U. Chi. L. Rev. 254 (1974); Note, *Admissibility of Computer-Kept Business Records*, 55 Cornell L. Rev. 1033 (1970). As to the hearsay and best evidence problems associated with computer-generated evidence, see rule 803(6) and Article X of the Federal Rules of Evidence and Barton & Cowart, *The Enigma of Hearsay*, 49 Miss. L.J. 31 (1978).

[202] 222 So. 2d 393 (Miss. 1969), *noted in* 41 Miss. L.J. 604 (1970).

with modern needs, the court held that computer printouts of business records stored on electronic computing equipment are admissible if relevant and material, without the necessity of identifying, locating, and producing as witnesses those individuals who made entries in the regular course of business. Admissibility on this basis requires a showing that the electronic computer is standard equipment and that the entries were made in the regular course of business near in time to the recorded event. Furthermore, the sources of information and method of preparation the information undergoes must also be trustworthy to justify admission.[203]

D. Surveys, Samples and Polls

The admissibility of surveys and samplings depends upon the necessity and trustworthiness of the results.[204] Survey results should be admissible if the proponent offers sufficient evidence to show the survey procedure was accurate and properly conducted.[205] Similarly, a poll must have been conducted according to currently recognized scientific polling methods, and the persons selected to be polled must reflect the attitudes of the group in question.[206]

E. Tests and Experiments

In the only federal case found dealing with the question of admissibility of electronic medical tests results, *Croll v. John Hancock Mutual Life Insurance Co.*,[207] the court held that electrocardiogram results were admissible if proved under the Federal Business Records Act.[208] The better rule, however, appears to be that authentication of encephalograms, electrocardiograms, and other records made by electronic instruments used in medical tests should be authenticated like X-rays.[209] Under both federal and Mississippi rules, results of other tests and experiments are admissible only when it is first shown that the test circumstances are identical or nearly identical with those circumstances with which the tests are sought to be compared.[210] Whether the circumstances are sufficiently similar is within the discretion of trial judges.[211]

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[203] 222 So. 2d at 397.

[204] United States v. Aluminum Co. of America, 35 F. Supp. 820, 823 (S.D.N.Y. 1940).

[205] *See* Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670, 682 (S.D.N.Y. 1963).

[206] 5 WEINSTEIN'S EVIDENCE ¶ 901(b)(9)[03], at 901-115 to -116 (1976).

[207] 198 F.2d 562 (3d Cir. 1952).

[208] *Id.* at 567.

[209] See notes 31 through 39 and accompanying text *supra*. For a discussion of admissibility of encephalograms, electrocardiograms, and other records made by instruments used in medical tests and reports based on such tests, see Annot., 66 A.L.R.2d 536, 542 (1969).

[210] *See, e.g.,* Barnes v. General Motors Corp., 547 F.2d 275, 277 (5th Cir. 1977) (out

Rule 901(b)(10). Methods Provided by Statute or Rule

Rule 901(b)(10) makes it clear that methods of authentication provided by the Federal Rules of Civil and Criminal Procedure, by the Bankruptcy Act, and by other specific acts of Congress are not superseded by the Federal Rules of Evidence. Thus, the rule that facilitates authentication with the greatest ease may be used.[212]

RULE 902 . SELF-AUTHENTICATION[213]

A class of documents that identify and prove themselves is created

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of court experiment results erroneously entered into evidence when the experiment was conducted under significantly different circumstances than those existing at the time of the accident); Booth v. Garan, Inc., 476 F.2d 591, 592 (5th Cir. 1973) (per curiam) (circumstances in experiment must be substantially similar to those in incident at issue to afford a fair comparison); Illinois Cent. R.R. v. Ishee, 317 So. 2d 923, 925-26 (Miss. 1975) (experiment properly excluded when other evidence showed lack of similarity in conditions of experiment and accident).

[211] *E.g.*, Barnes v. General Motors Corp., 547 F.2d 275, 277 (5th Cir. 1977); Booth v. Garan, Inc., 476 F.2d 591, 592 (5th Cir. 1973) (per curiam); Council v. Duprel, 250 Miss. 269, 305, 165 So. 2d 134, 150 (1964); Building Insulators, Inc. v. Stuart, 243 Miss. 287, 294, 136 So. 2d 613, 616 (1962).

[212] See note 16 *supra*. For comprehensive lists of statutes providing methods of authentication, see FED. R. CIV. P. 44, Advisory Comm. Notes; FED. R. CRIM. P. 27, Advisory Comm. Notes.

[213] FED. R. EVID. 902 provides:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
>
> (2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
>
> (3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the

by rule 902. The concept of self-authentication is based upon the premise that the criminal sanctions imposed for forgery of public documents and the ease of detection of forgery are sufficient deterrents to minimize the danger of forgery of such documents.[214] The rule does not preclude the opposing party from disputing authenticity should forgery be suspected; it merely eliminates the requirement that the proponent offer independent evidence of authentication as a condition precedent to admissibility of the self-authenticating document.[215]

> execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.
>
> (4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.
>
> (5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.
>
> (6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.
>
> (7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.
>
> (8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
>
> (9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
>
> (10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

[214] FED. R. EVID. 902(1), Advisory Comm. Note.

[215] *Id.* As with rule 901, it must be remembered that authentication under the federal rules is not a substitute for evidence when authenticity is challenged on substantial grounds. *See, e.g.*, United States v. Starks, 515 F.2d 112, 122 (3d Cir. 1975) (presumption of regularity in handling and custody of physical or documentary evidence by public officials does not serve as a substitute for evidence when authenticity is challenged on substantial grounds). Even though a public document is competent evidence, it may not

Rule 902(1). Domestic Public Documents Under Seal[216]

A self-authenticating domestic public document under seal must bear an official seal and an official signature. Such documents include state and federal, judicial and nonjudicial records.[217] Additionally, rule 902(1) places no point of public authority below which the court will refuse to recognize the genuineness of an official's seal.[218]

The Mississippi Legislature has enacted two statutes dealing respectively with authentication of federal records and of other states' records. Section 13-1-79 of the Mississippi Code[219] provides that certified copies of records, books, and files of offices of the United States shall be evidence when the originals or sworn copies could be admitted. By necessary implication, the statute also recognizes the self-authentication of the original of such document under seal. Section 13-1-99,[220] on the other hand, provides for self-authentication of copies of the record of any writing required or permitted to be recorded by the laws of any other state or territory of the United States or of the District of Columbia if certified under seal by the record's custodian. If the execution of the writing is disputed on oath by the opposite party, however, the original must be produced, or its absence accounted for, before the copy will be received in evidence.[221] This statute also provides that the original of any listed writing shall be evidence without further proof of execution "when acknowledged or proved according to the laws of the state or territory where executed, so as to be entitled to be recorded there." In spite of the language "so as to be entitled to be recorded there," the Mississippi Supreme Court has interpreted section 13-1-99 to require that the original actually be recorded in the other state or territory before it will be received in a Mississippi court without further proof of its execution.[222]

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be received into evidence unless and until it has been authenticated. *E.g.*, Yaich v. United States, 283 F.2d 613, 616-17 (9th Cir. 1960).

[216] See note 213 *supra*; Evidence 🔑 345, 348.

[217] 5 WEINSTEIN'S EVIDENCE ¶ 902(1)[01], at 902-2 to -14 (1976).

[218] *Id.* at 902-14. In United States v. Wingard, 522 F.2d 796, 797 (4th Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976), the court held that since the FDIC is an agency of the United States government, certificates bearing its seal and bearing a signature purporting to be an attestation or execution are admissible under rule 902(1) without extrinsic evidence of their authenticity.

[219] MISS. CODE ANN. § 13-1-79 (1972).

[220] *Id.* § 13-1-99.

[221] In Robinson v. Williams, 213 Miss. 467, 57 So. 2d 294 (1952), a certificate of a clerk from a foreign jurisdiction was not properly authenticated and therefore was inadmissible. *Id.* at 474, 57 So. 2d at 297. The court, however, remanded the case in order that the certificate could be properly authenticated and rendered competent as evidence. *Id.*

[222] *See, e.g.*, Lock v. Jayne, 39 Miss. 157, 164 (1860) (unrecorded original deed, though acknowledged or proved and entitled to be recorded, was not self-authenticating unless

In addition to these statutes, the full faith and credit clause of the Constitution[223] provides that the public acts, records, and judicial proceedings of every other state may be self-authenticated in other states' courts. This authentication is routinely accomplished pursuant to the Federal Business Records Act,[224] which provides that acts, or copies thereof, of the legislature of any state, territory, or possession of the United States may be authenticated by affixing the seal of the governmental unit. The Act further provides that records and judicial proceedings of any court of a state, territory, or possession may be authenticated by attestation of the clerk, annexation of the seal of the court, and certification by the judge that attestation is in proper form. Also, all nonjudicial records or books kept in any public office of any state, territory, or possession of the United States may be authenticated by attestation of the record's custodian, with the seal of his office annexed, together with a certificate from the proper state authority that such attestation is in due form and by the proper officers.[225] Thus, a foreign judgment offered in evidence in a federal action in Mississippi may be authenticated in accordance with either Mississippi[226] or federal statutory law.[227]

Speaking to the authentication requirements for a foreign judgment under the Federal Business Records Act, the Mississippi Supreme Court stated in *Jones v. McCormick*:[228]

> The objection to the certification of this decree is that the copy . . . is not accompanied by a copy of the record on which it was rendered. It is not necessary, in suing on a judgment or decree, to exhibit a copy of the record on which it was rendered. All that is necessary is to allege the required jurisdictional fact and to exhibit a copy of the judgment or decree.[229]

Many of the Mississippi statutes dealing with self-authentication of documents from offices or officers of this state also provide for self-authentication of copies.[230]

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actually recorded); Davis v. Rhodes, 39 Miss. 152, 156 (1860) (when an instrument is not properly recorded in a foreign jurisdiction, and consequently not properly certified, it is inadmissible).

[223] U.S. CONST. art. IV, § 2.

[224] 28 U.S.C. § 1738 (1970).

[225] *Id.* § 1739.

[226] MISS. CODE ANN. § 13-1-99 (1972). See note 235 and accompanying text *supra.*

[227] General Acceptance Corp. v. Holbrook, 254 Miss. 78, 81, 179 So. 2d 845, 846 (1965).

[228] 145 Miss. 566, 110 So. 591 (1926).

[229] *Id.* at 577, 110 So. at 592; *accord,* Dickson v. Lindsey, 234 Miss. 684, 691, 107 So. 2d 732, 734 (1958).

[230] Statutes providing for self-authentication of documents from offices or officers of this state are: MISS. CODE ANN. § 7-1-9 (1972) (official acts of governor); *id.* § 7-3-7

Also falling within the rule 902(1) class of self-authenticating public documents under seal are those bearing the seal of the appropriate office attesting to the absence of specified documents within the records of that office. In *United States v. Farris*,[231] the court held that computer data compilations officially certified under seal were self-authenticating and properly admitted in evidence for the purpose of showing that income tax returns had not been filed by the defendant over the years in question.[232] Mississippi law likewise provides for self-authentication of sealed documents attesting to the absence of specified documents in a public office. Under section 13-1-83[233] a certificate, under the hand and seal of the officer given legal custody of a record or paper and attesting that a diligent search has not disclosed the record or paper, is admissible. The document so admitted has the same effect as if the officer personally testified to the facts stated in the certificate.

Rule 902(2). Domestic Public Documents Not Under Seal[234]

Public documents not under seal may be self-authenticated by

(documents authenticated by seal and signature of secretary of state); *id.* § 7-3-43 (certificate under seal signed by secretary of state and governor attesting to official character of state officer); *id.* § 7-11-7 (land commissioner); *id.* § 27-3-19 (tax commission); *id.* § 33-3-13 (adjutant general); *id.* § 37-3-3 (department of education); *id.* § 41-1-3 (department of public health); *id.* § 47-5-7 (Supp. 1976) (penitentiary board); *id.* § 47-7-15 (1972) (probation and parole board); *id.* § 49-17-9 (air and water pollution control commission); *id.* § 51-7-25 (master water management district); *id.* § 57-1-3(3) (agriculture and industrial board); *id.* § 63-17-61 (1972) (motor vehicle commission); *id.* § 67-1-35 (alcoholic beverage control division); *id.* § 69-27-23(2) (soil and water conservation district); *id.* § 71-3-89 (workmen's compensation commission); *id.* § 73-5-3 (Supp. 1976) (board of bar examiners); *id.* § 74-5-115 (1972) (employment security commission); *id.* § 77-1-3 (public service commission); *id.* § 79-3-275 (certificates issued by secretary of state relating to business corporations and associations); *id.* § 81-1-3 (department of bank supervisors); *id.* § 83-1-11 (department of insurance). Furthermore, the authors interpret *id.* §§ 47-7-15, 49-17-9, 51-7-25, 74-5-115 (authorizing judicial notice of the seals of departments) and 37-3-3 (seal of the board of education may be used to certify its official acts), when read in conjunction with § 13-1-81 (any certification, attestation, or authentication by any person as an officer of any state or the United States is prima facie evidence of the official character of such person), as authorizing self-authentication of documents containing the seal of the respective departments where certified by the appropriate officer. *See* Sessions v. Reynolds, 15 Miss. (7 S. & M.) 130, 155 (1846) (pursuant to what is now § 13-1-81, certificate of foreign mayor to be prima facie evidence of conformity to law). *See also* Woodson v. Jones, 203 Miss. 152, 154-55, 33 So. 2d 316, 316 (1948) (jurat of attesting officer loses its presumptive force when other proof shows that the signature on the instrument is different from the genuine signature of the party who allegedly executed the instrument).

[231] 517 F.2d 226 (7th Cir.), *cert. denied,* 423 U.S. 892 (1975).

[232] 517 F.2d at 228-29; *accord,* Robbins v. United States, 476 F.2d 26, 29 (10th Cir. 1973) (lack of firearm registration).

[233] MISS. CODE ANN. § 13-1-83 (1972).

[234] See note 213 *supra.*

proof that the signature affixed is official and genuine. Such proof must be made by another official who has a seal. The requirement of a seal in this case is premised on the ease with which a document may be forged.[235] Similarly, Mississippi has statutorily provided for self-authentication of documents not under seal.[236]

Rule 902(3). Foreign Public Documents[237]

Foreign public documents are self-authenticating after two conditions are met. The document must be executed or attested by an official authorized to do so by the laws of his country, and a United States diplomatic or consular official must certify that either the person executing the document or the last person in a chain of certificates of genuineness is the proper official to execute or certify it and that his signature is genuine. Rule 902(3) is more liberal than its predecessor, rule 44(a)(2) of the Federal Rules of Civil Procedure. Besides acknowledging the practical problems an attorney faces in obtaining properly authenticated documents from abroad, rule 902(3) also permits originals as well as copies to be self-authenticated. Furthermore, the trial judge is given discretion to forego final certification or to admit attested summaries with or without final certification.[238]

In *United States v. Leal*,[239] foreign immigration records were admitted in a prosecution for importation of heroin, even though final certification had not been obtained. The court reasoned that the defendant could not claim he was prevented from investigating the authenticity of the subject immigration records and that the government made a sufficient showing of good cause for not having certification.[240]

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[235] FED. R. EVID. 902(2), Advisory Comm. Note.

[236] Mississippi statutes authorizing self-authentication of certain public documents not under seal include: MISS. CODE ANN. § 13-1-113 (1972) (certificate of county surveyor or deputy of survey made in county or by court order is presumptive evidence of the facts contained within such survey); *id.* § 13-1-115 (list of lands sold to the state at tax sale is prima facie evidence the assessment and sale were legal and valid); *id.* § 13-1-129 (record and copy of record of officer protesting any promissory note or bill of exchange is evidence of the facts stated therein touching on the dishonor of such bill or note and of the giving or mailing of notice thereof to parties secondarily liable when certified by the officer); *id.* § 13-1-131 (all certificates issued pursuant to act of Congress founded upon title from the United States of any land in the state shall be received in evidence); *id.* § 41-61-17 (Supp. 1976) (records or transcripts of state medical examiner are admissible when properly certified by written certificate); *id.* § 69-3-25 (1972) (examiner's analysis certificate verified by affidavit is competent evidence in a suit for violation of the Agricultural Seeds Act).

[237] See note 213 *supra*; Evidence 🔑 331, 349.

[238] 5 WEINSTEIN'S EVIDENCE ¶ 902(3)[01], at 902-18 (1976).

[239] 509 F.2d 122 (9th Cir. 1975).

[240] *Id.* at 126; *see* United States v. Rodriguez Serrate, 534 F.2d 7, 10 (1st Cir. 1976)

Mississippi deals with self-authentication of foreign writings with section 13-1-101 of the Mississippi Code,[241] setting out specific requirements in detail.[242] Since the section covers both originals and copies of foreign records, and since it only covers documents that may be recorded rather than public documents generally, it is comparable to and more closely aligned with the provisions of the next rule, 902(4).

Rule 902(4). Certified Copies of Public Records[243]

Rule 902(4) allows self-authentication of certified copies of public records, reports, and documents recorded or filed in a public office. The 902(4) certificate corresponds to that required for self-authentication of originals under the previous three rules, or any other applicable act of Congress, or rule prescribed by the Supreme Court,[244] though an additional indication of the correctness of the copy is required. The authenticity of the original record is guaranteed by the first of these certifications.[245] Although the rule is silent about the elements that must be contained in the certification of custody and correctness, any reasonable statement implying custody and correctness should be sufficient.[246] Rule 902(4)'s provision that the certification may be by any "other person authorized to make the certification" contemplates certification by any deputy custodians or others in the office of the custodian who are authorized to make copies of the records in their keeping.[247]

The Advisory Committee's note to rule 902(4) states that "docu-

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(when Fed. R. Civ. P. 44, which governs the admission of foreign documents, is substantially complied with, such documents are admissible).

[241] Miss. Code Ann. § 13-1-101 (1972).

[242] It is interesting to note that the only case cited under this section, McLeod v. Bridges, 180 Miss. 585, 588-89, 78 So. 321, 321 (1938), deals with a certificate from an office of another state rather than a certificate from an office of a foreign country. This case would have been more appropriately decided under Miss. Code Ann. § 13-1-99 (1972), dealing with admissibility of copies of writings recorded in other states.

[243] See note 213 *supra*; Evidence 🔑 345, 348.

[244] Fed. R. Evid. 902(4), Advisory Comm. Note. Certification by rule would include Fed. R. Crim. P. 27 and Fed. R. Civ. P. 44 as well as the numerous other authentication statutes cited in the Advisory Committee's notes to each rule.

[245] 5 Weinstein's Evidence ¶ 902(4)[01], at 902-20 (1976).

[246] *Id. But see* Mullican v. United States, 252 F.2d 398, 401-02 (5th Cir. 1958) (court required substantial exactness in recitals of the statutory requirements on the certificates). The authors recommend strict compliance with the language contained in the self-authentication paragraphs to avoid the difficulty of proof, loss of time, and possible loss of case should it be determined at trial the document is not properly authenticated and therefore not admissible.

[247] 5 Weinstein's Evidence ¶ 902(4)[01], at 902-21 (1976); *see, e.g.*, National Acceptance Soc'y v. Spiro, 94 F. 750, 751 (2d Cir. 1899) (per curiam) (in case involving a judgment as evidence, court held that a deputy or administerial officer can do every act which his principal might do).

ments provable when presented in original form under paragraphs (1), (2), or (3) [of rule 902] may not be provable by certified copy under paragraph (4)." The authors submit that it was not the intent of Congress or the drafters of the Federal Rules of Evidence to exclude self-authentication of certified copies of public documents and that this statement should be disregarded. As we understand rule 902, any original public document can be self-authenticated under paragraphs (1), (2), or (3). Since rule 902 surely intends self-authentication of certified copies of such documents, and since there is no provision in any of the first three paragraphs for certification of copies, self-authentication of all public documents should be allowed pursuant to paragraph (4) of rule 902.

Section 13-1-77 of the Mississippi Code[248] allows certified copies of any public book, record, paper, or writing by the officer having custody to be admitted when the original or sworn copy would be admissible. Various other statutes similarly provide for self-authentication of copies of specific documents.[249]

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[248] MISS. CODE ANN. § 13-1-77 (1972).

[249] Mississippi statutory law specifically authorizes self-authentication of the following certified copies of public records or documents: *id.* § 7-3-7 (documents of secretary of state); *id.* § 13-1-79 (records, books, and files of offices of the United States); *id.* § 13-1-85 (documents preserved by the department of archives and history); *id.* § 13-1-89 (entry on judgment roll); *id.* § 13-1-91 (conveyances under judgment of justice court judge); *id.* § 13-1-93 (taxed bill of costs); *id.* § 13-1-95 (record of accounting pursuant to order of board of supervisors); *id.* § 13-1-97 (recorded instruments); *id.* § 13-1-99 (writings of any other state or territory of the United States or District of Columbia); *id.* § 13-1-101 (public documents from foreign countries); *id.* § 13-1-103 (marriage certificates); *id.* § 13-1-105 (wills and codicils); *id.* § 13-1-107 (land records); *id.* § 13-1-109 (survey notes); *id.* § 13-1-111 (prior testimony); *id.* § 13-1-117 (record of appointment of foreign executor, administrator, or guardian); *id.* § 13-1-125 (official bond); *id.* § 13-1-127 (writings filed in other proceedings); *id.* § 13-1-129 (record of protest of promissory note or bill of exchange); *id.* § 21-13-17 (municipal ordinances); *id.* § 25-55-7 (lost or destroyed records); *id.* § 33-3-13 (papers of adjutant general); *id.* § 41-57-9 (birth and death certificates); *id.* § 41-57-47 (marriage certificates); *id.* § 41-61-17 (Supp. 1976) (records of state medical examiner); *id.* § 51-4-15 (capacity use map); *id.* § 61-3-11 (1972) (Municipal Airport Authority Resolution); *id.* § 65-1-15 (papers of highway department); *id.* § 67-1-35 (records of alcohol beverage control division); *id.* § 69-27-23(2) (certificate of soil conservation district); *id.* § 73-6-11 (Supp. 1976) (records of board of chiropractic examiners); *id.* § 73-19-15 (1972) (transcript of board of optometry); *id.* § 73-35-5(c) (Supp. 1976) (records of real estate commission); *id.* § 79-1-23 (1972) (charter or articles of incorporation); *id.* § 79-3-275 (records of secretary of state); *id.* § 81-1-3 (papers of department of bank supervisor); *id.* § 83-1-11 (papers of insurance commission); *id.* § 83-29-27 (license of fraternal benefit society); *id.* § 83-29-41 (constitution of fraternal benefit society); *id.* § 87-3-1 (letters of attorney).

In considering each of the statutes enumerated above, it should be remembered that pursuant to *id.* § 13-1-81, the certificate of each officer specified therein is prima facie evidence of his official character.

Rule 902(5). Official Publications[250]

Rule 902(5) envisions self-authentication of all books, pamphlets, and other publications purporting to be issued by a public authority. While this rule is silent concerning the level of government that must authorize the publication, Judge Weinstein suggests that officially published local ordinances should be included.[251] Under Mississippi procedure, however, municipal ordinances must be authenticated either through introduction of the actual minute book containing the ordinance at issue or through admission of a copy of the ordinance certified by the clerk of the municipality,[252] as must the rules and regulations of state boards and agencies.[253] Furthermore, section 13-1-95 of the Mississippi Code[254] provides for self-authentication of county records only by certified copies. On the state, national, and international levels, Mississippi law does permit self-authentication of publications purporting to be issued by a public authority. Section 13-1-147[255] provides that the printed acts of the state legislature "published by authority thereof, shall be competent evidence of such acts," while section 13-1-149[256] grants to state courts the authority to take judicial notice of the laws of the United States, all other states and territories of the United States, the District of Columbia, and foreign countries "in the same manner as if the question arose under the law of this state."[257]

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[250] See note 213 *supra*; Evidence 🔑 328, 332-34, 362, 366.

[251] 5 Weinstein's Evidence ¶ 902(5)[01], at 902-26 (1976).

[252] Miss. Code Ann. § 21-13-17 (1972); *cf.* Naul v. McComb, 70 Miss. 699, 701, 12 So. 903, 903 (1893) (Mississippi courts will not take judicial notice of town ordinances).

[253] *See* Jenkins v. Cogan, 238 Miss. 543, 555, 119 So. 2d 363, 368 (1960) (rules and regulations of the Motor Vehicle Comptroller); Covington County v. Pickering, 123 Miss. 20, 27, 85 So. 114, 115 (1920) (en banc) (rules and regulations of the Livestock Sanitary Board); *cf.* Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 220-21 (Miss. 1969) (government safety codes and regulations are admissible only when they have been given compulsory force by the state legislature).

[254] Miss. Code Ann. § 13-1-95 (1972).

[255] *Id.* § 13-1-147.

[256] *Id.* § 13-1-149.

[257] *See, e.g.*, Parker v. McCaskey Register Co., 177 Miss. 347, 355, 171 So. 337, 338 (1936) (judicial notice taken of Ohio law authorizing notary public to administer and certify oath); Williams v. State, 151 Miss. 82, 84, 117 So. 360, 360-61 (1928) (judicial notice taken of another state's statute regarding residence requirement for divorce action); Stewart v. Swanzy, 23 Miss. 502, 504 (1852) (copy of the printed statutes of South Carolina purported to be printed by the authority of that state was admitted); Baughan v. Graham, 2 Miss. (1 Howard) 220, 224 (1835) (foreign statute laws must be shown to be published by authority of that state). Reading *Stewart* and *Baughan* together, it would seem that a printed book of statutes that expressly states the entity under whose official authority it was printed would be self-authenticating.

Rule 902(6). Newspapers and Periodicals[258]

Inclusion of newspapers and periodicals in the class of self-authenticating documents is premised upon the substantial improbability of their forgery.[259] But establishing the authenticity of newspapers or periodicals still leaves open questions of responsibility for particular items that are published.[260] In answer, Judge Weinstein suggests "notices and advertisements appearing in newspapers and periodicals should be considered prima facie evidence that they were inserted by authority of the person" whose name appears in such advertisement or notice.[261] Mississippi procedure, on the other hand, agrees with the Advisory Committee in requiring further proof regarding the authority to publicize items even after the paper itself is authenticated. In *Saenger Amusement Co. v. Murray*,[262] the Mississippi Supreme Court held that a newspaper advertisement carrying the defendant's name was not admissible to show that the defendant in fact owned the business advertised.[263] The authors side with the view holding that published notices should be considered prima facie evidence of authority since authentication does not close the issue but merely shifts the burden. Furthermore, the entity whose name appears in such notices is in a better position to disprove authorization than the party who viewed the notice is to prove affirmatively by extrinsic evidence that authority existed.[264]

Rule 902(7). Trade Inscriptions and the Like[265]

The reasons normally asserted for dispensing with preliminary proof of genuineness of commercial and mercantile labels include the slight risk of forgery, penalties for trademark infringement, and the great efforts to induce reliance in commercial identification.[266] The requirement that a label be affixed "in the course of business" does not restrict self-authentication to commercial ventures but extends to any ongoing enterprise or institution and includes, for example, private universities and social organizations that use identity symbols on products they distribute.[267] The rule's major significance is the ease with which products liability defendants may now be associated with their allegedly defective products.[268] Thus, the rule will avoid the needless confusion and inconsistency that occurred, for example, in *Murphy v. Campbell Soup Co.*[269] In *Murphy,* the plaintiff introduced the label from the can the contents of which allegedly caused food poisoning. The First Circuit held that the label itself, which was the familiar Campbell Soup Company label using its normal colors and including the words "Campbell Vegetable Soup," was insufficient to prove the food was manufactured or processed by the defendant.[270] In contrast, Mississippi has long recognized a self-authentication rule similar to that provided by rule 902(7). In *Curtiss Candy Co. v. Johnson,*[271] the Mississippi Supreme Court held that it was a jury question whether the defendant in fact manufactured the defective candy when the evidence revealed that the candy purchased and consumed by plaintiff was wrapped in an original package bearing the name of the defendant manufacturer.[272]

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[258] See note 213 *supra*; Acknowledgement 🔑 52, 54; Evidence 🔑 381.

[259] FED. R. EVID. 902(6), Advisory Comm. Note.

[260] *Id.*

[261] 5 WEINSTEIN'S EVIDENCE ¶ 902(6)[01], at 902-27 (1976).

[262] 128 Miss. 782, 91 So. 459 (1922).

[263] *Id.* at 790, 91 So. at 460-61.

[264] *See* 5 WEINSTEIN'S EVIDENCE ¶ 901(b)[01], at 902-26 to -27 (1976).

[265] See note 213 *supra*.

[266] FED. R. EVID. 902(7), Advisory Comm. Note. *See also* 19 U.S.C. § 1615(2) (1970) (marks, labels, brands or stamps indicating the foreign origin of merchandise are prima facie evidence of such origin).

[267] 5 WEINSTEIN'S EVIDENCE ¶ 902(7)[01], at 902-29 (1976).

Rule 902(8). Acknowledged Documents[273]

All documents accompanied by a certificate of acknowledgement legally executed by a notary or other officer authorized by law to take acknowledgements may be self-authenticated. Authorized acknowledgers are determined by resort to state law.[274] Mississippi, however, limits self-authentication to those documents expressly enumerated in applicable statutes.[275]

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[268] *See id.* at 902-27 to -29.

[269] 62 F.2d 564 (1st Cir. 1933).

[270] *Id.* at 565.

[271] 163 Miss. 426, 141 So. 762 (1932).

[272] *Id.* at 434, 141 So. at 764. In Swift & Co. v. Hawkins, 174 Miss. 253, 257, 164 So. 231, 235 (1935), the court again applied the self-authentication rule to packaged food products and further stated that, even though the defendant did not manufacture the product, it was still liable to the plaintiff for selling the product under the defendant's name.

[273] See note 213 *supra.*

[274] 5 WEINSTEIN'S EVIDENCE ¶ 902(8)[01], at 902-30 (1976). In Mississippi the applicable statutes are: MISS. CODE ANN. § 7-3-9 (1972) (secretary of state); *id.* § 25-3-17 (notaries public); *id.* § 25-33-17 (ex-officio notaries public, including justice court judges and circuit and chancery court clerks); *id.* § 25-33-23 (commissioned officers of the United States Armed Forces); *id.* § 35-1-13 (state veterans affairs commissioner); *id.* § 65-1-15 (secretary of the state highway commission).

[275] These statutes are: MISS. CODE ANN. § 11-5-35 (1972) (exhibits to bills or answers); *id.* § 13-1-97 (original of any writing entitled to be recorded in Mississippi); *id.* § 13-1-101 (original which may be admitted to record upon acknowledgement or proof under the laws of a foreign country); *id.* § 13-1-143 (publication of notice in newspaper when required by law or by order of the court); *id.* § 13-1-145 (posting of any notice required by law or court order); *id.* § 41-9-103 (hospital records obtained by a subpoena duces tecum).

Rule 902(9). Commercial Paper and Related Documents[276]

In discussing the requirements for self-authentication of commercial paper and related documents, the Advisory Committee pointed out that the phrase "to the extent provided by general commercial law" is used rather than the term "to the extent provided by the Uniform Commercial Code" to avoid the potential complications inherent in relying on local statutes.[277] The pertinent Uniform Commercial Code provisions are sections: 1-202, authenticity of third party documents in a contract dispute, 3-307(1)(b), authenticity of signatures on a negotiable instrument, 3-510, authenticity of dishonor of a negotiable instrument, and 8-105(2)(a), authenticity of signatures on a negotiable security. Each has been adopted in Mississippi.[278] All other documents sought to be established in a suit governed by the Mississippi Commercial Code must be authenticated by the other applicable rules of authentication both in federal and Mississippi courts.[279]

Rule 902(10). Presumptions Under Acts of Congress[280]

Paragraph ten of rule 902, like its counterpart in rule 901, permits self-authentication as provided in any applicable act of Congress.[281] In contrast, however, it does not allow self-authentication under rules promulgated by the Supreme Court. The rule has no applicability in state court.

RULE 903. SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY[282]

Testimony by a subscribing witness is unnecessary under rule 903, unless such a witness is required by the state law governing the document. If no witness is required, rules 901 and 902 will determine authentication in federal court.[283] Rule 903, however, applies only where the document is introduced to prove its execution.[284] Consequently, even though state law requires a subscribing witness, where documents are offered for other purposes, such as proof of delivery or that the writing constitutes an admission, authenticity will be governed in federal court by rules 901 and 902 rather than by state law.[285]

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[276] See note 213 *supra.*

[277] FED. R. EVID. 902(9), Advisory Comm. Note. Federal commercial law will apply where federal commercial paper is involved. H.R. REP. No. 650, 93d Cong., 1st Sess. 17 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7090.

[278] MISS. CODE ANN. §§ 75-1-202, -3-307(1)(b), -3-510, -8-105(2)(a) (1972).

[279] 5 WEINSTEIN'S EVIDENCE ¶ 902(9)[01], at 902-35 (1976).

[280] See note 213 *supra.*

[281] FED. R. EVID. 902(10), Advisory Comm. Note.

[282] FED. R. EVID. 903 provides: "The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing." See Evidence 🔑 374.

[283] 5 WEINSTEIN'S EVIDENCE ¶ 903[01], at 903-2 (1976).

[284] *See* 4 J. WIGMORE, *supra* note 7, § 1293 (Chadbourn rev. 1972).

Wills are the primary example of state law controlling under rule 903. In Mississippi, the due execution of a will "must be proved by at least one of the subscribing witnesses if [any are] alive and competent to testify."[286] If none of the subscribing witnesses can be produced, the will must be established by proving the handwriting of the testator and at least two signatures of the subscribing witnesses.[287] The testimony of a subscribing witness is not required, however, when the proponent introduces a record of probate of the will in common form that contains the affidavit of a subscribing witness or other testimony in writing proving the validity of the will.[288] Pursuant to section 91-7-9 of the Mississippi Code,[289] when there is no contest about the validity or execution of the will, the required proof of a subscribing witness can be had through affidavit of such witness certified by any officer of the state competent to administer oaths.[290] If the will is contested, however, the attendance of an attesting witness is required.[291]

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[285] 5 WEINSTEIN'S EVIDENCE ¶ 903[03], at 903-5 (1976).

[286] MISS. CODE ANN. § 91-7-7 (1972); *see, e.g.,* Warren v. Estate of Sidney, 183 Miss. 669, 676, 184 So. 806, 807-08 (1938) (subscribing witnesses must be produced if possible); Helm v. Sheeks, 116 Miss. 726, 732, 77 So. 820, 822 (1918) (en banc) (when subscribing witnesses can prove facts regarding the execution of a will, secondary evidence cannot be used until the subscribing witnesses have been called or produced); *cf.* Ward v. Ward, 124 Miss. 697, 706-07, 87 So. 153, 154 (1921) (failure of proponent to introduce attesting witnesses cured when contestant introduces such witnesses).

[287] *See, e.g.,* Estate of Willis v. Willis, 207 So. 2d 348, 349 (Miss. 1968) (identification of two subscribing witnesses' signatures is required to prove due execution if the witnesses are deceased).

[288] *See, e.g.,* Bearden v. Gibson, 215 Miss. 218, 219, 60 So. 2d 655, 656 (1952) (introduction of such record makes out a prima facie case); *cf.* Gibson v. Jones, 238 Miss. 186, 189, 117 So. 2d 879, 880 (1960) (when record of probate in common form does not contain the affidavit of subscribing witnesses or other testimony proving the validity of the will in writing, and there is no explanation of the absence of such proof, the record is not prima facie evidence of the validity of the will).

[289] MISS. CODE ANN. § 91-7-9 (1972).

[290] *See, e.g.,* Hilton v. Johnson, 194 Miss. 671, 678, 12 So. 2d 524, 526 (1943) (affidavit of two subscribing witnesses sufficient in will contest after probate); Austin v. Patrick, 179 Miss. 718, 724, 176 So. 714, 716 (1937) (affidavit of two subscribing witnesses sufficient for probate of will in common form).

MISS. CODE ANN. § 91-7-10 (Supp. 1976) provides that when there is no contest, holographic wills or codicils may be proved by affidavits made before an officer in the state authorized to administer oaths. Two persons familiar with the handwriting and signature of the testator or testatrix and not interested in the estate must attest to the authenticity of the will or codicil and the testator's or testatrix' competency to make a testamentary disposition of property.

[291] *See* Chapman v. Chapman, 264 So. 2d 395, 398 (Miss. 1972) (when will is contested, affidavit by attesting witness is insufficient).

If the subscribing witness is unable to prove execution due to lack of memory, the proponent is no longer hampered by any rule concerning attesting witnesses.[292] Even if the subscribing witness denies the facts of execution, the proponent may still prove the facts of due execution by other testimony.[293]

PRETRIAL AUTHENTICATION

Because of the substantial amount of trial time and energy that must often be consumed in authenticating particular items of evidence pursuant to both the Federal Rules of Evidence and the complementary Mississippi authentication procedures, the authors suggest that an attempt be made to obtain any required authentication prior to trial. Pretrial authentication will not only serve to reduce trial time but will also avoid the necessity of offering collateral proof, which only serves to confuse or distract the jury. This suggestion is not intended to be applicable to situations involving crucial evidence when proof of authenticity of a particular item of evidence serves to buttress the proponent's ultimate claim or defense. In such a situation, it would be a mistake to forego proof of authenticity before the trier of fact.

Under both Mississippi and federal procedures there are several methods by which authentication can be obtained prior to trial. The first and easiest method is by stipulation of authenticity by counsel. This possibility should always be explored. Second, in civil cases, authentication can be obtained by a request for admission pursuant to rule 36 of the Federal Rules of Civil Procedure or its equivalent, section 13-1-236 of the Mississippi Code.[294] If the initial response is unsatisfactory or if an objection is made, the requesting party may make a motion prior to trial for a determination of the sufficiency of answers or objections to its request.[295] Additionally, if the genuineness of a proffered item is denied in answer to the request for admissions and the requesting party thereafter proves the genuineness of the item at trial, the latter may apply for an order by the court requiring the adversary to pay the reasonable cost of proving the authentication.[296] Third, the proponent of an item of evidence that must be authenticated may attempt to secure admission of the authenticity of such item at a pretrial conference held under various federal and state rules.[297] Both rule 16 of the Federal Rules of Civil Procedure and section 11-1-6 of the Mississippi Code provide specifically for the holding of pretrial conferences to consider fact and document admissions to avoid unnecessary delay and proof.[298] The authors strongly recommend the use of pretrial conferences to obtain agreements as to authenticity of tangible evidence in all cases that involve a substantial number of tangible items of evidence.[299]

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[292] Tyson v. Utterback, 154 Miss. 381, 391, 122 So. 496, 498 (1929).

[293] *E.g.*, Williams v. Morehead, 116 Miss. 653, 658, 77 So. 658, 660 (1918); Martin v. Perkins, 56 Miss. 204, 209 (1878). Similarly, testimony by the subscribing witnesses in favor of execution is not necessarily conclusive. 4 J. WIGMORE, *supra* note 7, § 1302, at 725 (Chadbourn rev. 1972).

[294] *Compare* FED. R. CIV. P. 36 *with* MISS. CODE ANN. § 13-1-236 (Supp. 1976).

[295] *Compare* FED. R. CIV. P. 36(a) *with* MISS. CODE ANN. § 13-1-236(a) (Supp. 1976).

[296] *Compare* FED. R. CIV. P. 37(c) *with* MISS. CODE. ANN. §§ 13-1-236(a), -237(a)(4) (Supp. 1976).

Pretrial authentication can also be obtained in civil cases in both federal and state courts by attachment of written instruments as appendices to pleadings. Under rule 10(c) of the Federal Rules of Civil Procedure, such attachments serve to authenticate the documents so far as the offering party is concerned. In suits founded on written instruments set forth in the pleadings, it is not necessary in Mississippi courts to prove the signatures or executions of such instruments unless they are specifically denied by opposing pleadings verified by oaths.[300] Fifth, an admission of authenticity may be obtained through the use of interrogatories propounded under rule 33 of the Federal Rules of Civil Procedure or section 13-1-233 of the Mississippi Code.[301] Finally, an admission may be obtained during the taking of depositions pursuant to rules 30 and 31 of the Federal Rules of Civil Procedure, rule 15 of the Federal Rules of Criminal Procedure in exceptional circumstances, or sections 13-1-230 and 13-1-231 of the Mississippi Code.[302] Depositions are authenticated for use at trial by certification of the officer taking the deposition.[303]

CONCLUSION

A formal codified rule analogous to rule 901 of the Federal Rules of Evidence is not necessary in Mississippi. As indicated in the introduction to this Article, those methods of extrinsic authentication illustrated in rule 901 have, with certain minor variations, long been recognized by the Mississippi Supreme Court. The ultimate question in both federal and state courts is simply whether the authenticating proof is sufficient to support a finding that the matter in question is what its proponent claims. Thus, the only purpose to be served by codification of current Mississippi law would be to provide a canopy under which applicable case law could be annotated. That canopy would provide a single reference source to which litigants could quickly refer to determine the applicable authentication rules governing introduction of a particular item of evidence. This Article is intended to serve that purpose. There are differences, however, between the respective Mississippi statutory rules and federal rules governing self-authentication of public documents and records. Mississippi's self-authentication rules pertaining to public documents and records are much too numerous, varied, and imprecise. Therefore, there is a need for some revision, judicial or legislative, aimed at uniformity and brevity. The authors recommend adoption in Mississippi of a statute or set of complementary statutes providing for self-authentication of all public documents and records in accordance with the provisions of the federal rules. Additionally, to avoid questions of interpretation which develop in analyzing the interrelationship with the public documents provisions of rule 902, it should be made clear under any statutory configuration adopted in Mississippi that certified copies of all public documents and records are also self-authenticating.

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[297] *See, e.g.*, FED. R. CIV. P. 16; FED. R. CRIM. P. 17.1; MISS. CODE ANN. § 11-1-6 (Supp. 1976).

[298] *Compare* FED. R. CIV. P. 16 *with* MISS. CODE ANN. § 11-1-6 (Supp. 1976).

[299] The pretrial conference will be used to authenticate documents in any trial in the United States District Court for the Northern District of Mississippi. The court currently requires as a part of the pretrial order an agreement by both parties about the authenticity of all documents to be introduced at trial unless specific, good faith exceptions are taken. N.D. MISS. R. C-10(b)(2), *reprinted in* THE MISSISSIPPI ATTORNEY'S DESK BOOK ND-8 (2d ed. 1977).

[300] MISS. CODE ANN. § 13-1-139 (1972).

[301] *Id.* § 13-1-233 (Supp. 1976).

[302] *Id.* §§ 13-1-230, -231.

[303] FED. R. CIV. P. 30(f), 31(b); FED. R. CRIM. P. 15(d), (e); MISS. CODE ANN. §§ 13-1-230(f), -231(b) (Supp. 1976).

Finally, the authors do not recommend the adoption of rule 902(8), permitting self-authentication of all acknowledged documents, because of the fear that documents are not always acknowledged in the presence of the certifying officer and consequent belief that reliance on such documents may be misplaced. The assertion in the Advisory Committee's note to rule 902(8) that if a document of such importance as an acknowledged land deed can be self-authenticated then all other acknowledged instruments should be also is not well-reasoned. The importance normally attaching to land transactions, which results in the signatory's desire to properly execute such a document to ensure its integrity, is not always present in connection with other, more common types of acknowledged documents such as court pleadings or affidavits. We submit that Mississippi's current rule concerning self-authentication of certain acknowledged documents, which requires additional indicia of trustworthiness by limiting application of those rules to documents entitled to be filed of public record and documents executed by noninterested third parties, is proper and needs no modification.

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

*Thomas D. Bourdeaux**
*Charles C. Pearce***

The trial of a lawsuit demands the application of evidentiary rules that will ensure that triers of fact have for their consideration accurate and trustworthy evidence. Within the context of proving writings and other tangible articles communicating information, the test of admissibility traditionally applied by courts has been known as the "best evidence rule."[1] While the drafters of the federal rules refrained from the use of this terminology, they have preserved the best evidence requirement by making it applicable only as an original documents requirement.[2] Article X represents a codification of this "requirement of the original" rule, its exceptions, and its modifications.

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[1] While the term "best evidence" has received widespread usage, its interpretation has not been uniform. Under the older view, it referred to the production of the best evidence available while the more modern interpretation applies the rule as a requirement that one produce the original writing when seeking to prove its contents. C. McCormick, Handbook of the Law of Evidence § 229, at 559-60 (2d (E. Cleary) ed. 1972); J. Thayer, Preliminary Treatise on Evidence at the Common Law 497-507 (1898). Thayer advocated abolishing the phrase "best evidence" from legal reasoning since it has become a narrow declaration that one must not offer anything which itself imports that it is a substitute for something else. *Id.* Legal scholars have noted the existence of this dual application but have determined that the proper interpretation of the best evidence rule lies in the requirement of an original. *E.g.*, 5 Weinstein's Evidence ¶ 1002[01], at 1002-4 (1976) ("The federal courts had adopted the view . . . that there is no general rule of best evidence before the adoption of the federal rules."); C. McCormick, *supra*, § 229, at 560 ("The only actual rule that the 'best evidence' phrase denotes today is the rule requiring the production of the original writing."); E. Morgan, Basic Problems of Evidence 385 (1962) ("The so-called best evidence rule is at present a rule governing the admissibility of evidence of the content of a writing. It requires the production of the original writing itself . . . ."); 4 J. Wigmore, Evidence in Trials at Common Law § 1174, at 401 (Chadbourn rev. 1972) ("The sooner the phrase [best evidence] is wholly abandoned, the better."). *But see* 2 S. Gard, Jones on Evidence § 7:1, at 84, § 7:2, at 88 (6th ed. 1972) (best evidence rule "is a convenient short description of the rule governing proof of the contents of a writing," although author acknowledges that the rule has been broadly stated as a requirement of the "best" evidence in each situation.)

[2] Fed. R. Evid. 1002; *see id.* 1001, Advisory Comm. Notes (noting the misleading nature of the term "best evidence rule"). The principle was also rejected by prior federal case law. *E.g.*, Herring v. Administrator, FAA, 532 F.2d 1003, 1004 (5th Cir. 1976) (" 'Best evidence' . . . applies only to the requirement that the terms of a writing be shown by

The purpose of this Article is to review the development of the eight rules contained in Article X, to note federal cases interpreting or applying these rules, and finally, to compare these rules with Mississippi state court practice. It should become apparent to the reader as he continues through this Article that Mississippi case law and statutory enactments have not yet achieved the broad scope of Article X. With few exceptions, however, the federal rules for gaining admission of contents of originals do not represent radical changes from that to which the Mississippi practitioner is accustomed.

RULE 1001(1). DEFINITIONS: WRITINGS AND RECORDINGS[3]

With the exception of those jurisdictions that treated the best evidence rule as a literal requirement of the *best*,[4] the requirement that an original be produced has traditionally applied only to writings,[5] which were interpreted as written or printed words.[6] Because of technological advances in presenting information, the drafters of Article X expanded the requirement of an original rule to include modern methods of storing data.[7] Any documentary evidence, whether perceived visually or aurally, is now subject to the requirement of an original if it consists of letters, words, or numbers. This expansion is specifically directed at tape and other electronic or mechanical recording devices.[8]

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production of the original document . . . ."); United States v. Alexander, 326 F.2d 736, 739 (4th Cir. 1964) ("It is now generally recognized that the 'best evidence' phrase denotes only the rule of evidence which requires that the contents of an available written document be proved by introduction of the document itself.").

[3] FED. R. EVID. 1001(1) provides: "'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." See Criminal Law 🔑 398-99; Evidence 🔑 157-87.

[4] *See* note 1 *supra* (discussion of the best evidence rule as encompassing merely a requirement of an original).

[5] Prior to the adoption of the Federal Rules of Evidence, the federal judiciary generally agreed with this position and stated that the requirement of an original was "properly confined to writings." United States v. Waldin, 253 F.2d 551, 554 (3d Cir.), *cert. denied*, 356 U.S. 973 (1958); *accord*, United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973) (per curiam); Sayen v. Rydzewski, 387 F.2d 815, 819 (7th Cir. 1967).

[6] *See, e.g.*, 4 J. WIGMORE, *supra* note 1, § 1183, at 423 ("'writings' [are] things of paper or parchment employed solely as a material for bearing words written or printed in the form of complete clauses or sentences expressing connected thought").

[7] FED. R. EVID. 1001(1), Advisory Comm. Note.

[8] *Id.* The inclusion of these recording methods within the original requirement resolves some earlier confusion over their position in the federal courts. *Compare* United States v. Conway, 507 F.2d 1047, 1052 (5th Cir. 1975) (best evidence rule is applicable only to writings and is not applicable to tape recordings) *with* Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967) (requirement of an original found applicable to a tape recording of a telephone conversation), *cert. denied*, 398 U.S. 1005 (1968).

Expansion of the requirement of an original rule in accordance with the development of sophisticated devices for the accumulation and presentation of data has not gone unnoticed by the Mississippi Supreme Court. In *Ray v. State*,[9] the court affirmed a trial court's ruling allowing the admission of a tape recording to prove a recorded oral confession. The tape recording was held to be an accurate reproduction of the confession and was, therefore, competent evidence.[10] On another occasion, the court approved the admission of computer printouts as the best evidence of whatever information was stored in the computer, stating that "[t]he law . . . adjusts its rules to accommodate itself to the advancement of the age it serves."[11]

One area of confusion that persists despite the adoption of the Federal Rules of Evidence is inscribed chattels, or property with writing on it. Whether the words inscribed on the chattel are writings within the requirement that the original be produced is a problem which has troubled commentators.[12] Nor were the federal courts free from dispute, with some judges finding the rule applicable to such objects as liquor bottles,[13] checks,[14] and even marijuana plants.[15] The problem has not been eliminated by the Federal Rules of Evidence since rule 1001 makes no reference to inscribed chattels. This omission by the drafters of the rule implicitly adopts the solution that the trial court may use its discretion in determining whether production of the original is necessary.[16] Since no Mississippi authority has been found establishing the admissibility requirements of inscribed chattels, it is suggested that the discretionary approach be employed to resolve any future conflicts.

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[9] 213 Miss. 650, 57 So. 2d 469 (1952).

[10] *Id.* at 657, 57 So. 2d at 472. Interestingly, the court in this and subsequent decisions determined the admissibility of the tape recordings without discussing the best evidence rule, preferring to speak in terms of authenticity and accuracy. *See* Haynes v. AVCO Sec. Corp., 299 So. 2d 198, 201 (Miss. 1974) (tape recording refused admission because of failure to establish authenticity and accuracy); Carr v. State, 218 So. 2d 737 (Miss. 1969) (recording inadmissible because of inadequate preliminary proof of accuracy and authenticity). For a discussion of the Mississippi application of the best evidence rule, see notes 64 through 73 and accompanying text *infra*.

[11] King v. State *ex rel.* Murdock Acceptance Corp., 222 So. 2d 393, 397 (Miss. 1969), *noted in* 41 Miss. L.J. 604 (1970).

[12] *E.g.*, 5 Weinstein's Evidence ¶ 1001(1)[01], at 1001-12 (1976).

[13] *See, e.g.*, Driggers v. United States, 384 F.2d 158, 158 (5th Cir. 1967) (per curiam) (in prosecution for the sale of whiskey without revenue stamps, best evidence rule does not require production of the bottles); Burney v. United States, 339 F.2d 91, 94 (5th Cir. 1964) (production of liquor bottles not required). *But see* Watson v. United States, 224 F.2d 910, 911-12 (5th Cir. 1955) (in liquor stamp prosecution, best evidence rule mandated production of the whiskey bottles but a showing that no fraud was involved in their destruction was sufficient grounds for introduction of secondary evidence).

[14] *See, e.g.*, Myrick v. United States, 332 F.2d 279, 282 (5th Cir.) (check prosecution normally would require production of originals but 28 U.S.C. § 1732 provides statutory exception for duplicates), *cert. denied*, 377 U.S. 952 (1964); United States v. Alexander, 326 F.2d 736, 739-40 (4th Cir. 1964) (best evidence rule applicable to checks).

[15] *See* Francis v. United States, 239 F.2d 560, 562 (10th Cir. 1956) (court rejected defendant's argument that best evidence rule requires production of marijuana plants to substantiate chemist's testimony of their fertility).

Rule 1001(2). Definitions: Photographs[17]

Recognizing that pictorial evidence can have independent probative value,[18] drafters of the federal rules expanded the requirement of an original to include photographs, motion pictures, video tapes, and X-rays. They agreed with earlier commentators[19] that the inclusion of photographs would have little effect on the ordinary use of pictorial evidence but found the extension of Article X was warranted to cover the few important situations where the films or photographs were introduced as evidence of their contents. Cases dealing with copyright infringement, invasion of privacy, libel,[20] and pornography[21] are examples of situations in which photographic evidence might be necessary.

Rule 1001(3). Definitions: Original[22]

Although it would seem that little difficulty would be experienced in distinguishing an original document from a copy, the definition of an original has historically been a highly disputed subject[23] since what may be an original to the layman may be a duplicate in court.[24] Similarly, a single document may be both an original for one cause of action and a copy for a different controversy arising out of the same fact situation. For example, in an action against a telegraph company for the delayed transmission of a message entrusted to it, the original is the message delivered to the telegraph company.[25] On the other hand, if the dispute is for breach of contractual promise by failure to uphold a telegraphed offer, then the copy of the telegraphed message as received is the original.[26] It was the subtlety of this distinction that prompted Professor Wigmore to formulate the following test for determining whether an instrument is an original:

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[16] This position would be consistent with prior federal case authority, *e.g.*, United States v. Duffy, 454 F.2d 809, 812 (5th Cir. 1972) ("When the disputed evidence . . . is an object bearing a mark or inscription, and is, therefore, a chattel *and* a writing, the trial judge has discretion to treat the evidence as a chattel or as a writing."), and with the recommendation of two noted evidence scholars who agreed that "the judge shall have discretion to apply the present rule to inscribed chattels or not in light of such factors as the need for the precise information as to the exact inscription, the ease or difficulty of production, and the simplicity or complexity of the inscription." C. McCormick, *supra* note 1, § 232, at 562 (citing 4 J. Wigmore, *supra* note 1, § 1182).

[17] Fed. R. Evid. 1001(2) provides: " 'Photographs' include still photographs, X-ray films, video tapes, and motion pictures." See Criminal Law 🔑 340, 400(1), 438; Evidence 🔑 157-58, 177, 178(2), (14), 359, 379-80.

[18] *See, e.g.*, the cases noted in the text accompanying notes 75 through 80 *infra*.

[19] *E.g.*, C. McCormick, *supra* note 1, § 232, at 563; Paradis, *The Celluloid Witness*, 37 Colo. L. Rev. 235, 247-49 (1965).

[20] Fed. R. Evid. 1002, Advisory Comm. Notes.

[21] United States v. Levine, 546 F.2d 658 (5th Cir. 1977). *See also* 5 Weinstein's Evidence ¶ 1001(2)[01], 1001-16 (1976).

[22] Fed. R. Evid. 1001(3) provides:

> An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

See Criminal Law 🔑 398, 400, 402, 429-47; Evidence 🔑157(1),(3).

> [T]he production required is the production of *the* document *whose contents are to be proved in the state of the issues.* Whether or not that document was written before or after another, was copied from another, or was itself used to copy from, is immaterial. The question becomes: Is this the very document whose contents are desired to be, and in the now state of the issues by the substantive law may be, proved?[27]

While this general test is an adequate representation of the legal concept of an original, the Federal Rules of Evidence set out a simpler test to determine whether a writing or recording is an original. Rule 1001(3) takes the position that an original of a writing or recording is determined by the person who executes or issues it. Even a counterpart is an original if so intended by its issuer.[28]

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[23] *E.g.*, Comment, *Contents of Writings, Recordings, and Photographs,* 27 Ark. L. Rev. 357, 367-68 (1973).

[24] 5 Weinstein's Evidence ¶ 1001(3)[01], at 1001-49 (1976).

[25] *See* Hartzell v. United States, 72 F.2d 569, 578 (8th Cir.) (criminal fraud in the transmission of telegram; primary evidence was the telegram as delivered to the telegraph company, but use of duplicates was allowed because originals were outside courts' jurisdiction), *cert. denied,* 293 U.S. 621 (1934); Collins v. Western Union Tel. Co., 145 Ala. 412, 41 So. 160, 162 (1906) (court suggested that the telegram as delivered to the telegraph company would be the best evidence but allowed introduction of the telegram received because there was no claim that it contained any error).

[26] 5 Weinstein's Evidence ¶ 1001(3)[02], at 1001-57 (1976). A copy later amended by the parties may also be an original. *See* Walker Inv. Inc. v. American Express Warehousing Corp., 276 F.2d 591, 593 (5th Cir. 1960) (amended receipts); Marker v. Presidential Ins. Co., 273 F.2d 258 (5th Cir. 1959) (amended death certificate).

[27] 4 J. Wigmore, *supra* note 1, § 1232, at 548.

[28] Fed. R. Evid. 1001(3); *see id.*, Advisory Comm. Note ("A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer."). The Mississippi Supreme Court has recognized a counterpart as an original under circumstances that would seem to accord with the "intent of the issuer" ideal of rule 1001(3). *See* Panola County Bank v. J.O. Lumber Co., 117 Miss. 583, 588, 78 So. 516, 518 (1918) (copies of a bill of lading issued in triplicate were originals).

A photographic original includes the negative and any print from the negative.[29] Also of significance to modern litigation is rule 1001(3)'s designation of a computer printout as an original.[30] This position follows the Mississippi rule stated in the often cited case of *King v. State ex rel. Murdock Acceptance Corp.*[31] At issue in *King* was the amount of loss suffered by Murdock because of a false notarial certificate. Murdock attempted to prove its loss by introducing computer printout sheets showing the status of certain accounts secured by the falsely notarized instrument. The trial court admitted the printout as the best evidence of the accounts, and the Mississippi Supreme Court affirmed, declaring:

> Records stored on magnetic tape by data processing machines are unavailable and useless except by means of the printout sheets such as those admitted in evidence in this case. In admitting the printout sheets reflecting the record stored on the tape, the court is actually following the best evidence rule.[32]

RULE 1001(4). DEFINITIONS: DUPLICATE[33]

Determination of those duplicates that would be treated as originals was traditionally based on the time of creation[34] and limited to copies produced from the same matrix as the original or copies produced as duplicate originals.[35] Because the duplicate original concept was also based on time of creation, its application to the various modes of reproduction has resulted in inconsistencies. For example, a majority of courts considered a carbon copy as a duplicate original because it was executed at the same time as the original.[36] Photostatic copies, however, were invariably treated as secondary evidence rather than duplicate originals.[37] Although their accuracy was rarely questioned, photostatic copies are not executed simultaneously with the original.

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[29] *See* United States v. Levine, 546 F.2d 658, 668 (5th Cir. 1977) (in obscenity prosecution, introduction of print made from film negative qualified as an original under rule 1001(3)). Permitting the negative or any print therefrom to be admitted as the "original" is consistent with prior federal case authority. *See, e.g.*, Lucas v. City of Charlotte, 14 F. Supp. 163, 167 (D.N.C.) (photographic negatives admitted), *aff'd*, 86 F.2d 394 (4th Cir. 1936).

[30] Prior federal case law is in accord. *See, e.g.*, United States v. Russo, 480 F.2d 1228, 1239-41 (6th Cir. 1973) (computer printouts admitted), *cert. denied*, 414 U.S. 1157 (1974). Punched cards and magnetic tapes are also originals under rule 1001(3). 5 WEINSTEIN'S EVIDENCE ¶ 1001(3)[04], at 1001-67 (1976).

[31] 222 So. 2d 393 (Miss. 1969), *noted in* 41 MISS. L.J. 604 (1970).

[32] 222 So. 2d at 398.

[33] FED. R. EVID. 1001(4) provides:

> A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

See Criminal Law 🔑 398, 400; Evidence 🔑 157(1),(3), 158(15), (21), (27), (28), 174(1), (4), 186(2), (6), 187.

[34] For example, if multiple copies of a document were executed simultaneously, each was treated as an original. Tampa Shipbuilding & Eng. Co. v. General Constr. Co., 43 F.2d 300, 311 (5th Cir. 1930) (duplicate originals stated to "exist only when the two instruments have been recognized and established by the parties concerned as the evidence of their act, as where the parties to a sale sign a memorandum with carbon copy and each keeps one"); C. MCCORMICK, *supra* note 1, § 235, at 567. When the copies were the result of subsequent reproduction, however, the concept of manual transcription caused many courts to categorize them as secondary evidence. *Id.* § 236, at 567; *see* Sauget

Prior to the adoption of the Federal Rules of Evidence, several federal courts moved to abolish this arbitrariness by adopting a less rigid and more sensible approach of treating copies as originals,[38] unless there was a dispute over accuracy.[39] This emphasis on practical considerations was also carried over into the formulation of the admissibility standards for the more modern data storage devices such as tape recordings[40] and

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v. Johnston, 315 F.2d 816, 817-18 (9th Cir. 1963) ("The primary reason the original of a writing is preferred to a copy is that the copy is always subject to errors on the part of the copyist.").

[35] *E.g.*, Sauget v. Johnston, 315 F.2d 816, 817 (9th Cir. 1963) ("A duplicate original or originally executed copy of a written instrument is generally considered to be an original within the meaning of the best evidence rule."); *see* 5 WEINSTEIN'S EVIDENCE ¶ 1001(4)[01], at 1001-67 (1976).

[36] *See, e.g.*, United States v. Knight, 451 F.2d 275, 280 (5th Cir. 1971) (carbon copies are duplicate originals and thus admissible without accounting for the nonproduction of the original), *cert. denied*, 405 U.S. 965 (1972); Bruce v. United States, 351 F.2d 318, 321 (5th Cir. 1965) (carbon copy of inventory letter admitted), *cert. denied*, 384 U.S. 921 (1966); O'Shea v. United States, 93 F.2d 169, 172 (6th Cir. 1937) (carbon copies are duplicate originals, not secondary evidence, and are admissible as originals).

[37] *See, e.g.*, Toho Bussan Kaisha Ltd. v. American President Lines, Ltd., 265 F.2d 418, 423-24 (2d Cir. 1958) ("Photostats made at some late time are not duplicate originals."); Bateman v. United States, 212 F.2d 61, 68 (9th Cir. 1954) (photographic reproduction treated as secondary evidence but found to be admissible because original had been destroyed). The distinction between photostatic and carbon copies was clearly arbitrary, and it prompted judicial criticism. *See, e.g.*, United States v. Manton, 107 F.2d 834, 844-45 (2d Cir.) (photostatic copies of checks admitted because there was no question of their accuracy and because exclusion would result in "strained application" of the best evidence rule), *cert. denied*, 309 U.S. 664 (1939). This eventually led to the widespread enactment of the UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT, 9A U.L.A. 584, *cited in* C. MCCORMICK, *supra* note 1, § 236, at 568 n.68. As of 1967, the act had been adopted by 38 states and had been incorporated into the Federal Business Records Act, 28 U.S.C. § 1732 (1970). *See* C. MCCORMICK, *supra* note 2,§ 236, at 568 n.69. These efforts have not completely alleviated the problem because the courts have continued to treat photographic copies as secondary evidence unless they were made in the regular course of business. *Id.* at 568-69.

[38] 5 WEINSTEIN'S EVIDENCE ¶ 1001(4)[01], at 1001-67 to -68 (1976).

[39] See notes 89 through 95 and accompanying text *infra*.

[40] *See, e.g.*, United States v. Hall, 342 F.2d 849, 852-53 (4th Cir.) (where preceded by playing of the partially inaudible original wire recording, court allowed playing of a

computer memories.[41]

The federal rules continue the trend away from the common law's limited concept of "duplicate." Under rule 1001(4) the primary concern of the drafters was that the counterpart be produced by "methods possessing an accuracy which virtually eliminates the possibility of error."[42] As a result, duplicates are defined to include any method which assures accurate reproduction of the original.[43] Such copies are largely given the status of originals by rule 1003.[44]

The Mississippi Supreme Court has seldom been faced with the necessity of defining a duplicate for purposes of the best evidence rule, although the court has held in one case that, where bills of lading were issued in triplicate, the two carbons were also originals.[45] They were not considered to be duplicates, as would be the case under the federal rules. Thus, the Mississippi law on this point indicates that the state's jurisprudence has not reached the degree of sophistication requiring a distinction between duplicates and copies.

Rule 1002. Requirement of Original[46]

Rule 1002 represents a codification of the familiar common law rule that requires one to produce the original of a document to prove its contents, expanded to include writings, recordings, and photographs as defined in rule 1001(1) and (2).[47] Several reasons exist for requiring that

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tape rerecording and use of transcripts by each juror), *cert. denied,* 382 U.S. 812 (1965); Johns v. United States, 323 F.2d 421, 421 (5th Cir. 1963) (per curiam) (where audibility prevented use of the original wire recording, the use of a rerecording did not violate the best evidence rule because accuracy of the recording was conceded).

[41] United States v. Farris, 517 F.2d 226, 228-29 (7th Cir.) (no error found in trial court's admission of computer printout), *cert. denied,* 423 U.S. 892 (1975). *See generally* United States v. DeGeorgia, 420 F.2d 889, 893-94 (9th Cir. 1969).

[42] Fed. R. Evid. 1001(4), Advisory Comm. Note.

[43] Fed. R. Evid. 1001(4). The common law rule that classifies as secondary evidence those copies created subsequently to the original is limited to those that are produced manually, *i.e.,* handwritten or typed. *Id.,* Advisory Comm. Note; 5 Weinstein's Evidence ¶ 1001(4)[01], at 1001-68 (1976).

[44] See notes 85 through 97 and accompanying text *infra.*

[45] Panola County Bank v. J.O. Nessen Lumber Co., 117 Miss. 583, 588, 78 So. 516, 518 (1918); *see* Philley v. Toler, 239 Miss. 347, 361, 123 So. 2d 223, 228 (1960) (copies admitted where the opponent's own testimony established the correctness of the copies).

[46] Fed. R. Evid. 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." See Criminal Law 🔑 398-403; Evidence 🔑 157-87.

There is a difficult distinction to be drawn between proving the contents of a writing and proving its existence, execution, or delivery, or the existence of a particular entry. Ascertaining existence and identity is the subject of Article IX. *See generally* Pyle & Mockbee, *Authentication and Identification,* 49 Miss. L.J. 151 (1979).

[47] Fed. R. Evid. 1002, Advisory Comm. Notes. For a discussion of what constitutes a

the original be offered.[48] First, since a slight difference in words can make a great difference in meaning, and thus in rights, it is of substantial importance to have the exact words of the original document before the triers of fact.[49] Second, the probability of accuracy is increased by production of the original, as opposed to a copy, since the danger of human and mechanical error is eliminated.[50] Third, fraud is discouraged since the parties have a chance to examine the document for alterations, and its presence in court prevents the coloring of testimony.[51] Finally, the authenticity of the document may be established by reference to such things as handwriting, paper, and ink.[52]

While the rule appears relatively simple, its application becomes difficult when dealing with proof of an event which itself is not in the form of a writing but which has only incidentally been put in writing. For example, the payment of a debt may be proved by oral testimony even though a written receipt may exist.[53] Similarly, in *Meyers v. United States*,[54] the court held that perjury may be proved by witnesses who heard the false testimony even though a written transcript of the testi-

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"writing, recording, or photograph," see notes 3 through 21 and accompanying text *supra*. While rule 1002 represents the most modern definition of the requirement of an original, it follows several other definitions offered by commentators throughout the development of the law of evidence. *See, e.g.*, C. McCormick, *supra* note 1, § 230, at 560 ("[I]n proving the terms of a writing, where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent."); J. Thayer, *supra* note 1, at 503 ("if you would prove the contents of a writing, you must produce the writing itself"); 4 J. Wigmore, *supra* note 1, § 1178, at 415 ("In proving a writing, production must be made, unless it is not feasible, of the writing itself, whenever the purpose is to establish its terms."). *See generally* Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context,* 51 Iowa L. Rev. 825, 825-35 (1966).

[48] These reasons are summarized in 5 Weinstein's Evidence ¶ 1002[02], at 1002-5 to -6 (1976).

[49] C. McCormick, *supra* note 1, § 231, at 561.

[50] Broun, *Authentication and Contents of Writings,* 1969 Law & Soc. Ord. 611, 616.

[51] Comment, *A Critical Appraisal of the Application of the Best Evidence Rule,* 21 Rutgers L. Rev. 526, 528 (1967). *See* United States v. Manton, 107 F.2d 834, 845 (2d Cir.) (purpose of the best evidence rule is to guard against fraud and imposition), *cert. denied,* 309 U.S. 664 (1939).

[52] 4 J. Wigmore, *supra* note 1, § 1179, at 417. In United States v. Alexander, 326 F.2d 736 (4th Cir. 1964), the court stated:

> As to its contents, the writing is certain; and oral description thereof necessarily involves the frailties of human recollection and any copy, the hazards of faulty duplication. In addition, there exists the possibility of prejudice or interest influencing either the testimony of a witness or the accuracy of the copy. Given a choice between the two, the law accepts the certain and rejects the uncertain.

Id. at 742-43.

[53] 5 Weinstein's Evidence ¶ 1002[03], at 1002-4 (1976) (quoting E. Morgan, *supra* note 1, at 386-87). "Courts do not prevent oral testimony about a matter merely because it is also provable by a writing." Sayen v. Rydzewski, 387 F.2d 815, 819 (7th Cir. 1967).

[54] 171 F.2d 800 (D.C. Cir. 1948), *cert. denied,* 336 U.S. 912 (1949).

mony existed.[55] However, the court would also have been justified in requiring that the original transcript be produced and relying on it.[56] Applying the logic of *Meyers*, subsequent federal decisions held that the contents of a document are not at issue when the document is used merely to refresh a witness' memory,[57] or to base an expert opinion,[58] or to establish the absence of a document or language in a document.[59]

Rule 1002 also provides that its operation is subject to the provisions of other Federal Rules of Evidence or federal statutes. For example, as the Advisory Committee noted, rule 703 allows an expert to give his opinion based on materials not in evidence,[60] while rule 803(6) allows proof by records of a regularly conducted activity.[61] Among the acts of Congress referred to in the rule that permit copies to be treated as originals are those dealing with photographic evidence of tax returns[62] and photographic copies in the National Archives.[63]

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[55] *Id.* at 813 ("[T]here was no issue as to the contents of the transcript, and the government was not attempting to prove what it contained; the issue was what [the accused] actually had said. [The witness] was not asked what the transcript contained but what [the accused's] testimony had been."); *see, e.g.*, Sayen v. Rydzewski, 387 F.2d 815, 819 (7th Cir. 1967) (proof of plaintiff's income did not require production of his books and records because he was not attempting to prove their contents; to the contrary, he was testifying as to his income based on personal knowledge); United States v. White, 223 F.2d 674, 675 (2d Cir. 1955) (best evidence rule not applicable to tape recording of a confession because issue was what defendant had said and not the contents of the tape recording); Herzig v. Swift & Co., 146 F.2d 444, 445-46 (2d Cir.) (best evidence rule does not require production of partnership books to prove earnings because proof of earnings, although recorded in a writing, is not an attempt to prove the contents of any writing), *cert. denied*, 328 U.S. 849 (1945).

[56] 5 WEINSTEIN'S EVIDENCE ¶ 1002[03], at 1002-12 (1976).

[57] *See, e.g.*, Weir v. Commissioner, 283 F.2d 675, 678 (6th Cir. 1960) (petitioner's examination of various checks prior to testimony was merely a refreshing of his memory and not barred by the best evidence rule); United States v. Riccardi, 174 F.2d 883, 888-90 (3d Cir.) (witness' courtroom reference to a list of stolen chattels allowed without requiring production of the list), *cert. denied*, 337 U.S. 941 (1949).

[58] *See, e.g.*, Grummons v. Zollinger, 240 F. Supp. 63, 72 (N.D. Ind. 1964) (expert's use of report made by another expert as a determination of available information not precluded by the best evidence rule), *aff'd*, 341 F.2d 464 (7th Cir. 1965).

[59] *See, e.g.*, United States v. Jewett, 438 F.2d 495, 497-98 (8th Cir.) (parol testimony of absence of Indian trust land record did not violate best evidence rule), *cert. denied*, 402 U.S. 947 (1971).

[60] FED. R. EVID. 1002, Advisory Comm. Notes. For example, a doctor may predicate an opinion on X-rays not presented in evidence. However, if the doctor attempts to testify directly as to the contents of the X-ray, then the picture itself becomes the best evidence and must be offered. 5 WEINSTEIN'S EVIDENCE ¶ 1002[02], at 1002-1 (1976). See note 84 and accompanying text *infra*.

[61] FED. R. EVID. 1002, Advisory Comm. Notes. For example, if hospital records are admitted under rule 803(6), any description of X-rays contained in the records may be presented to the jury providing only the contents of the records are sought to be proved. But where the contents of the X-rays themselves are sought to be proved, the rule requiring an original may be successfully invoked.

[62] 26 U.S.C. § 7513 (1970).

While Mississippi and federal courts have recognized the principle of producing the original as the best evidence of a document,[64] the Mississippi Supreme Court has not limited the scope of the best evidence principle to originals. As a result, generalizations such as a "party must produce the best evidence which, under the circumstances, is attainable"[65] pervade the court's decisions.[66] This confusing and imprecise language has resulted in the use of the term best evidence in situations where it was not intended to apply, according to the more conventional definition of the term.[67] For example, in *Broadhead v. Stone*,[68] the issue was an assessment for additional income tax imposed by the State Tax Commission based on balance sheets prepared by the taxpayer's accountant. Copies of the balance sheets had been furnished to the taxpayer's bank in connection with the bank extending him credit. Because the accountant did not testify in verification of the balance sheets, they were not considered the "best evidence available" even though they were actually originals.[69]

The Mississippi Supreme Court has also extended the term best evidence beyond its traditional limitation to methods of communication. In *Yazoo & M.V.R.R. v. M. Levy & Sons*,[70] the rule was applied to damaged cotton. The court held that the testimony of a witness who was familiar with other cotton produced on the same plantation was the best evidence of the staple and grade of the damaged cotton despite his never having seen the damaged cotton.[71] In *Noble v. Logan-Dees Chevrolet-Buick, Inc.*,[72] the court used the term best evidence in referring to the parol evidence rule, holding that a written contract of sale between the parties was not merely the best but the only evidence of the parties' agreement.[73]

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[63] 44 U.S.C. § 399(a) (1970). An exhaustive list of exceptions to the Federal Rules of Evidence provided in the United States Code can be found in 5 WEINSTEIN'S EVIDENCE ¶ 1002[04], at 1002-17 n.1 (1976).

[64] *See, e.g.*, United States v. Alexander, 326 F.2d 736, 742 (4th Cir. 1964) ("As between a written instrument and a copy or parol description thereof, the rule operates to accept the former and exclude the latter."); Casey v. Valentour, 218 So. 2d 863, 865 (Miss. 1969) ("the contents of documents or records cannot properly be shown except by introducing the document itself").

[65] Storm v. Green, 51 Miss. 103, 107 (1875). In *Storm*, a written lease was found to be the best evidence of its terms. But where other witnesses testified as to its terms without objection, the court found the failure to produce the instrument was not error. *Id.*

[66] *See, e.g.*, King v. State *ex rel.* Murdock Acceptance Corp., 222 So. 2d 393, 397 (Miss. 1969) ("law always seeks the best evidence," whether documentary or otherwise); Citizens Bank v. Callicot, 178 Miss. 747, 756, 174 So. 78, 79 (1937) ("best evidence capable of being produced must be produced"); Scott v. Loomis, 21 Miss. 635, 640 (1850) ("The rule of law is, that the best evidence the nature of the case admits of must be produced; that is, that no evidence shall be received which presupposes the existence of evidence of a higher nature.").

[67] See notes 1 & 2 *supra.*

[68] 218 Miss. 911, 58 So. 2d 803 (1952).

[69] *Id.* at 931, 58 So. 2d at 811. This is, of course, a question of authentication, not proof of contents.

[70] 141 Miss. 199, 106 So. 525 (1925).

Historically, there have been few occasions to apply the original document requirement to photographs because, in the vast majority of cases, photographic evidence is used merely as demonstrative evidence, illustrative of a witness' testimony. The requirement of an original does not apply to such evidence.[74] Several decisions have, however, recognized that photographs and motion pictures should be governed by the requirement of an original when their contents are sought to be proved. As an example, one California case involved the fitness of a father to have custody of a minor child. Testimony that a witness had seen photographs of the father in the nude required production of the original photographs because the content of the picture, the father's allowing himself to be photographed nude, was the issue.[75] In *Houston v. Interstate Circuit*,[76] the son of Sam Houston brought suit to stop the exhibition of an allegedly libelous film about his father. The court held the motion picture original was required as the best evidence of its contents, since the defamatory content of the movie was the primary issue in the case.[77] In another state case dealing with the applicability of the best evidence rule to motion pictures, a film depicting events that occurred on a picket line was offered into evidence in a labor dispute.[78] Objection was made on the grounds that the particular print was not the original and that it had been cut and spliced. The court, holding that the best evidence rule did not apply, stated that the motion picture itself did not prove an actual occurrence but instead was a "pictorial communication" of the witness' testimony.[79] Rather than make the film inadmissible, the fact that it had been cut to insert titles affected the weight to be given the picture by the triers of fact.[80]

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[71] *Id.* at 210-11, 106 So. at 526-27. This inaccurate use of the term "best evidence" has been criticized by Wigmore. 4 J. WIGMORE, *supra* note 1, § 1174.

[72] 293 So. 2d 14 (Miss. 1974).

[73] *Id.* at 15. This use of the phrase "best evidence" has also been criticized by Wigmore. 4 J. WIGMORE, *supra* note 1, § 1174.

[74] *E.g.,* C. MCCORMICK, *supra* note 1, § 232, at 263; Paradis, *supra* note 19, at 247-49; *see, e.g.,* International Union v. Russell, 264 Ala. 456, 470, 88 So. 2d 175, 186 (1956) (trial court's decision that best evidence rule was inapplicable to duplicate motion picture was correct because movie merely illustrated witness' testimony), *aff'd,* 356 U.S. 634 (1958).

[75] Heinz v. Heinz, 73 Cal. App. 2d 61, 66, 165 P.2d 967, 971 (1946).

[76] 132 S.W.2d 903 (Tex. Ct. App. 1939).

[77] *Id.* at 906; *see* McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E.2d 289, 294 (1940) (applying best evidence rule, court held motion picture was not secondary evidence).

[78] International Union v. Russell, 264 Ala. 456, 88 So. 2d 175 (1956), *aff'd,* 356 U.S. 634 (1958).

[79] 88 So. 2d at 186.

Rule 1002 adopts the common law rule applying the requirement of an original when an X-ray is introduced to prove its contents.[81] Although the requirement of an original would theoretically apply everytime the X-ray's contents are in dispute, the pictures would be virtually meaningless to the lay juror without accompanying expert explanation and interpretation.[82] While the expert's testimony of the X-ray's contents is essential, at best it is only secondary evidence.[83] The problem is whether the expert may reflect upon the X-rays without introducing them in evidence. A literal reading of rule 1002 suggests that the X-ray is required, but the rule's drafters stated that this requirement should be tempered by rule 703,[84] which allows an expert to give an opinion on matters not in evidence.

The Mississippi Supreme Court decisions on the admissibility of still photographs, X-rays, videotapes, and motion pictures have not decided or even discussed the applicability of the best evidence rule.

Rule 1003. Admissibility of Duplicates[85]

One of the motivating factors behind the traditional best evidence rule has been fear of error by copyists.[86] Modern copying methods have assuaged this fear and eliminated most of the concerns about accepting a copy or duplicate in lieu of the original. The Federal Rules of Evidence recognize the reliability of modern copies by providing an expansive definition of duplicates[87] and by equating duplicates with originals unless there is some question about their accuracy or the fairness of their use.[88] Consequently, the proper inquiry under rule 1003 is whether a duplicate should be ruled inadmissible as inaccurate or unfair.

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[80] *Id.; accord,* Roberts v. Pierce, 398 F.2d 954, 957 (5th Cir. 1968).

[81] 5 Weinstein's Evidence ¶ 1002[03], at 1002-9 (1976).

[82] *Id.* ¶ 1001(2)[04]. *See also Article X—Contents of Writings, Recordings, and Photographs,* Fed'n of Ins. Counsel Q. 137, 142-43 (1973).

[83] Gay v. United States, 118 F.2d 160, 162 (7th Cir. 1941). *But cf.* Arnold v. Metropolitan Life Ins. Co., 89 S.W.2d 81, 83 (Mo. 1936) (the best evidence of what an X-ray discloses is the expert's interpretation).

[84] Fed. R. Evid. 1002, Advisory Comm. Notes. One analyst found the inconsistencies between rules 703 and 1002 irreconcilable. Comment, *Authentication and the Best Evidence Rule Under the Federal Rules of Evidence,* 16 Wayne L. Rev. 195, 221-22 (1969); *see, e.g.,* United States v. Gavic, 520 F.2d 1346, 1353 (8th Cir. 1975) (although not bound by the Federal Rules of Evidence, the court ruled that rule 703 would have allowed an expert to testify about chemical test results without requiring production of the results); *cf.* Spartan Grain & Mill Co. v. Ayrs, 517 F.2d 214, 220 (5th Cir. 1975) (nonexpert witness barred from testifying about contents of a lab report because the best evidence required report's production).

[85] Fed. R. Evid. 1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." See Criminal Law 🔑 398(1), (2), 400(1), (7), 438, 444; Evidence 🔑 157(1), (3), 171, 174(1), (4), 177, 183(3), (14), 185(1), 186(2), (6).

[86] *See* Sauget v. Johnston, 315 F.2d 816 (9th Cir. 1963).

With modern techniques of duplication, there should be few instances in which accuracy is challenged.[89] Where circumstances present a real possibility of fraud, however, the court should, on demand of opposing counsel, require the original over a duplicate.[90] Two recent cases have dealt with the question of authenticity of duplicates. In *CTS Corp. v. Piher International Corp.*,[91] the court held that a carbon copy of a purchase order was admissible under rule 1003 since there was "no basis in the record for questioning the authenticity of the purchase order."[92] The carbon copy had been offered while an employee of the corporation that executed it was testifying. The employee stated that he had directed a subordinate to issue the purchase order, and he described the items ordered. The court held these factors precluded a genuine question about the copy's authenticity. Likewise, in *United States v. Rodriguez*,[93] the defendant objected to admission of an unauthenticated photocopy of a vehicle certificate of title. Citing rule 1003, the appellate court affirmed the trial court's admission of the photostatic copy even though the rule had not been in effect at the time of the trial. The appellate court stated that the defendant had not raised a genuine challenge to authenticity, nor had he shown circumstances of unfairness.[94] As these cases illustrate, courts have not been particularly liberal in deciding that a genuine issue of the duplicate's authenticity has been raised.[95] Even so, when the proffered duplicate has been altered, mutilated, or is illegible, rule 1003 should require production of the original document if it is available.

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[87] See notes 33 through 45 and accompanying text *supra*.

[88] FED. R. EVID. 1003; *see* Diplomat Homes, Inc. v. Commercial Standard Ins. Co., 394 F. Supp. 558, 565 n.2 (W.D. Mo. 1975) (court followed rule 1003 even though not bound by it because it was found to be consistent with existing law). Indeed, the rationale for the rule can be found in cases predating the adoption of rule 1003 by 30 years. In United States v. Manton, 107 F.2d 834 (2d Cir. 1939), the court noted that an "overtechnical and strained" application of the best evidence rule can hamper the cause of truth. Moreover, if it appears that "secondary evidence is clearly equal in probative value to what is called the primary proof, and that fraud or imposition . . . is not to be feared, the reason upon which the best evidence rule rests ceases [and] the rule itself must cease to be applicable." *Id.* at 845. The determination of accuracy and fairness, however, is left to the sound discretion of the trial court, based on the legibility, audibility, or quality of the reproduction and the need to inspect the original to ascertain authenticity. 11 MOORE'S FEDERAL PRACTICE § 1003.02, at X-15 (1976). In directing the judge's discretion, the House Judiciary Committee added this clarifying note: "The Committee approved [rule 1003] in the form submitted by the Court, with the expectation that the Court would be liberal in deciding that 'a genuine question is raised as to the authenticity of the original.' " H.R. REP. No. 650, 93d Cong., 1st Sess. 17 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7090.

[89] The authors are, however, familiar with a recent unreported case in which corporate minutes had been prepared at a time substantially distant from the events they described. Although the proponent represented that they had been prepared contemporaneously with the events, opposing counsel proved by the manufacturer of the paper on which the minutes were written that the water mark shown had not been designed and put into use until several years after the date of the purported minutes. Photostatic or other copies would not have shown the water mark.

[90] 5 WEINSTEIN'S EVIDENCE ¶ 1003[02], at 1003-9 (1976).

[91] 527 F.2d 95 (7th Cir. 1975).

[92] *Id.* at 104 n.29.

[93] 524 F.2d 485 (5th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976).

Due to the subjective nature of fairness, unfair circumstances are explained better by illustration than by definition. In *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*,[96] the trial court excluded photostatic copies of a portion of the plaintiff's account books. The copies had been especially prepared for trial since the original records were located in Japan. In affirming the ruling, the Second Circuit stated that it was an imposition on the defendant to admit the photostats because there was no fair way to check their accuracy.[97]

While the Mississippi Supreme Court has seldom been faced with the need to define a duplicate,[98] it has stated that "it is the general rule that copies or photostatic copies of written instruments are not admissible in evidence except upon proper showing that they are correct copies and upon a proper accounting for the absence of the originals."[99] Many of the state decisions that address the use of copies deal with copies of business records. The early holdings prohibited any use of copies,[100] but these decisions concerned handwritten copies and can be distinguished on that basis. Presently, the admissibility of copies is largely regulated by statutes, most of which relate to certain official documents and other documents recorded among public records. Two are worthy of special note at this point because they resemble rule 1003 in some respects. These statutes authorize businesses[101] and hospitals[102] to make photographic or photostatic copies of their records and allow such copies to be admitted in court as originals.[103] The Mississippi statutes differ in approach from rule 1003 in that they treat such copies as originals and not as admissible duplicates. Although these statutory requirements will generally control, Mississippi has also allowed practical considerations to affect the admission of duplicates.[104]

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[94] *Id.* at 487-88.

[95] See note 88 *supra.*

[96] 265 F.2d 418 (2d Cir. 1959), *noted in* 76 A.L.R.2d 1344 (1961).

[97] 265 F.2d at 424. Judge Weinstein suggests that this decision is "doubtful" and should not be followed under rule 1003. 5 WEINSTEIN'S EVIDENCE ¶ 1001(4)[05], at 1001-90 (1976).

[98] See note 45 and accompanying text *supra.*

[99] Philley v. Toler, 239 Miss. 347, 361, 123 So. 2d 223, 228 (1960).

[100] *See* Dyson v. Baker, 54 Miss. 24, 29 (1876) (handwritten copies of business accounts not admitted); Moody v. Roberts, 41 Miss. 74, 78 (1866) (manually transcribed copies of business records are inadmissible despite proof of their accuracy).

[101] MISS. CODE ANN. § 13-1-151 (1972) (photographic copies of records made in the regular course of business are admissible as originals); *see* Bass v. State, 328 So. 2d 665, 667 (Miss. 1976) (use of photostatic copy of check upheld).

[102] MISS. CODE ANN. § 41-9-77 (1972) (copies of hospital records pertaining to treatment of patients are admissible as originals).

Rule 1004. Admissibility of Other Evidence of Contents

It has long been recognized that the fact finder should not be deprived of evidence of the contents of a writing, photograph, or recording simply because of the proponent's inability to produce the original.[105] Any evidence which is substituted for the original is regarded as secondary. Some writers and many courts have applied the best evidence rule literally and have recognized degrees of secondary evidence.[106] The drafters of the Federal Rules of Evidence, however, rejected this application because it resulted in "unwarranted complexities."[107]

The initial requirement for the admissibility of secondary evidence is that the absence of the original be explained. The determination that the original is unavailable and that satisfactory explanation of its absence has been offered is left to the court rather than to the jury.[108]

Rule 1004(1). Originals Lost or Destroyed[109]

Historically, the most common explanation for failing to produce an original has been loss or destruction.[110] The Federal Rules of Evidence essentially restate the common law rule by excusing production of the original in such instances, unless the proponent lost or destroyed the original in bad faith.[111] Rule 1004(1) does not prohibit the introduction of secondary evidence where the original has been intentionally lost or destroyed by the proponent; it applies only where bad faith motivated the act.[112] The burden of proving lack of bad faith is on the proponent.[113]

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[103] *See also id.* § 41-9-81 (provides that copies of hospital business records are admissible as originals).

[104] *See* Meek v. Farmers' Coop, 216 Miss. 140, 147-48, 61 So. 2d 778, 779-80 (1953) (in action to confirm a tax title, court allowed admission of a private copy of a survey map where the record copy was shown to be faded); Hauenstein v. Gillespie, 73 Miss. 742, 751, 19 So. 673, 674 (1896) (court admitted copies of business records because original books were the property of a third party and no question of their authenticity was raised).

[105] *See generally* 4 J. Wigmore, *supra* note 1, §§ 1193-1222, at 438-508.

[106] C. McCormick, *supra* note 1, § 241, at 575-77.

[107] Fed. R. Evid. 1004, Advisory Comm. Notes; United States v. Standing Soldier, 538 F.2d 196, 203 n.8 (8th Cir.), *cert. denied,* 429 U.S. 1025 (1976).

[108] United States v. Pacelli, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied,* 419 U.S. 826 (1974); United States v. Sheehan, 428 F.2d 67, 79 (8th Cir.), *cert. denied,* 400 U.S. 853 (1970); United States v. Covello, 410 F.2d 536, 543 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969); United States v. Ross, 321 F.2d 61, 70 (2d Cir.), *cert. denied,* 375 U.S. 894 (1963).

[109] Fed. R. Evid. 1004(1) provides: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ." See Evidence 🔑 176-78, 183.

[110] *See* Read v. Brookman, 3 Term R. 151, 159-60 (1789), *cited in* 4 J. Wigmore, *supra*

In order to gain admission of secondary evidence, the proponent must first establish nonavailability of the writing. While the order of proof is within the discretion of the trial court,[114] the proponent must authenticate the original by proving that it existed and was executed,[115] show the absence of the original,[116] and establish that the secondary evidence sought to be admitted reflects the contents of the original.[117]

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note 1, § 1193, at 439. This exception to the best evidence rule was acknowledged at an early stage of American jurisprudence in both the federal and state courts. *See, e.g.*, Renner v. Bank of Columbia, 22 U.S. (9 Wheat.) 581, 596-97 (1824) (secondary evidence of a promissory note admitted since original note had been in court a few days before and was subsequently mislaid by accident); Page v. State, 59 Miss. 474, 479-80 (1882) (although the general rule of admissibility was recognized, secondary evidence was held inadmissible since there was no showing of loss of the original). There is a distinction between destruction, which signifies that a thing does not exist, and loss, which merely means that it cannot be discovered. For practical purposes the two are assimilated for application. 4 J. WIGMORE, *supra* note 1, § 1194, at 439.

[111] *Accord,* United States v. Gerhart, 538 F.2d 807, 809 (8th Cir. 1976) (original photocopy of check misplaced; second photocopy of check admissible); Klein v. Frank, 534 F.2d 1104, 1107-08 (5th Cir. 1976) (where loss of letter was proved, court would have admitted secondary evidence of its contents if offered); Diplomat Homes, Inc. v. Commercial Standard Ins. Co., 394 F. Supp. 558, 566 (W.D. Mo. 1975) (duplicate binder of insurance held admissible in lieu of original to show existence of insurance coverage).

[112] United States v. Jacobs, 475 F.2d 270, 284-85 (2d Cir.), *cert. denied,* 414 U.S. 821 (1973); 5 WEINSTEIN'S EVIDENCE ¶ 1004(1)[02], at 1004-9 (1976).

[113] 4 J. WIGMORE, *supra* note 1, § 1198, at 455-60.

[114] *See* FED. R. EVID. 611(a) (court has control over mode and order of proof). Wigmore suggests proof of loss should precede proof of execution, 4 J. WIGMORE, *supra* note 1, § 1189, at 431-33, while Weinstein asserts that the issue is of little moment, 5 WEINSTEIN'S EVIDENCE ¶ 1004(1)[03], at 1004-12 (1976).

[115] 4 J. WIGMORE, *supra* note 1, § 1188, at 430. The Federal Rules of Evidence set out the requirements for authentication in rules 104 and 901. The rules regarding general relevancy, FED. R. EVID. 401-403, must also be met. "Before proof of contents can be admitted, the court should be satisfied that a reasonable juror could find . . . existence and due execution of the original in the same manner as if the original were produced." 5 WEINSTEIN'S EVIDENCE ¶ 1004(1)[03], at 1004-10.1 to -11 (1976) (footnotes omitted); *see, e.g.*, Carey v. Williams, 79 F. 906, 908 (2d Cir. 1897) (before secondary evidence can be used to prove contents of an original, proponent must prove that the original was executed by the party in question).

[116] 5 WEINSTEIN'S EVIDENCE ¶ 1004(1)[05], at 1004-17 (1976); *see* United States v. Gerhart, 538 F.2d 807, 809 (8th Cir. 1976) (original photocopy of check misplaced; second photocopy of check admissible).

[117] 5 WEINSTEIN'S EVIDENCE ¶ 1004(1)[03], at 1004-11 (1976).

The proponent may satisfy the burden of showing loss or destruction by either direct or circumstantial evidence. While it is easy to prove the destruction of a document by the testimony of the perpetrator or of an eyewitness, in most instances circumstantial evidence of an unsuccessful search may also be used.[118] Before allowing circumstantial evidence to show an unsuccessful search for the missing original, the court must be convinced that the search was reasonable.[119] Although the sufficiency of a search can only be determined by the circumstances of each case,[120] the search must always be "diligent" and "unsuccessful."[121] The proponent proves the search by explaining where he looked for the document and whom he asked about it.[122] The quality and extent of the search required will then depend on a number of factors including the importance of the missing document, any suspicion of fraud surrounding the absence, the age of the document, and the period of time since the document was last seen.[123]

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[118] For example, in making the necessary preliminary proof to gain admission of secondary evidence, the proponent might offer the testimony of one who made a search by seeking out the last known custodian of the original. This tends to show a good faith effort to locate the original, but it would be meaningless if the proponent could not go further and testify what the custodian said about the present existence of the original. C. McCormick, *supra* note 1, § 237, at 570; 5 Weinstein's Evidence ¶ 1004(1)[05], at 1004-21 (1976). The authorities are divided on whether the custodian's hearsay declarations concerning the loss or destruction of the instrument are admissible. One view is that the declarations are being offered as evidence that the fact of loss or destruction is true and thus is inadmissible as violative of the hearsay rule. *E.g.*, Moore v. State, 179 Miss. 268, 273-74, 175 So. 183, 183 (1937). The better view is that the custodian's declarations may be viewed as "merely one of the circumstances entering into the sufficiency of the search, *i.e.*, not as testimony to the fact asserted, but as a circumstance tending to show that the searcher has not failed in reasonable diligence." 4 J. Wigmore, *supra* note 1, § 1196, at 452; *see, e.g.*, Traders & General Ins. Co. v. Collins, 179 S.W.2d 525, 528 (Tex. Civ. App. 1944) (doctor allowed to testify concerning a telephone conversation in which he learned of the destruction of certain X-rays).

[119] *E.g.*, Simpson & Co. v. Dall, 70 U.S. (3 Wall.) 460, 474-75 (1865) (testimony as to contents of letter held improperly admitted as secondary evidence since no special search was made to determine if letter was lost); Harrington v. United States, 504 F.2d 1306, 1313 (1st Cir. 1974) (court order directing receiver in bankruptcy to dispose of corporation's records and papers held an inadequate showing of unavailability); Sylvania Elec. Prod., Inc. v. Flanagan, 352 F.2d 1005, 1008 (1st Cir. 1965) (no indication of a reasonable search for the original; secondary evidence held inadmissible); Von Brimmer v. Whirlpool Corp., 362 F. Supp. 1182, 1187 (N.D. Cal. 1973) (same).

[120] Sylvania Elec. Prod., Inc. v. Flanagan, 352 F.2d 1005, 1008 (1st Cir. 1965); *see* Minor v. Tillotson, 32 U.S. (7 Pet.) 99, 100-01 (1833) (court must look to circumstances); Willhoit v. Commissioner, 308 F.2d 259, 265 (9th Cir. 1962) (same); 5 Weinstein's Evidence ¶ 1004(1)[04] (1976). "While some courts have attempted to lay down strict rules as to what constitutes sufficient search, the better reasoned decisions have recognized that the sufficiency depends on the circumstances. The commentators uniformly agree." *Id.*

[121] 2 S. Gard, *supra* note 1, § 7:13, at 114-16; C. McCormick, *supra* note 1, § 237, at 571; 5 Weinstein's Evidence ¶ 1004(1)[05], at 1004-19 (1976); 4 J. Wigmore, *supra* note 1, § 1194, at 441. Wigmore insists that "there is not and cannot be any universal or fixed rule to test the sufficiency of the search." *Id.* at 440.

[122] 5 Weinstein's Evidence ¶ 1004(1)[05], at 1004-19 (1976); 4 J. Wigmore, *supra* note 1, § 1195, at 444. "[T]he party alleging the loss is expected to show 'that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of

Once the proponent has established the proper foundation for the introduction of secondary evidence, he may prove the contents of the original by any secondary evidence available.[124] The admissibility of secondary evidence cannot then be attacked, although the weight to be afforded it may, with the trier of fact being the final arbiter.[125]

Mississippi follows without substantial modification the common law rule that the contents of a document may be established by secondary evidence when the original has been lost or destroyed.[126] The admission of secondary evidence as a substitute for an unavailable original is precluded only when the proponent has lost or destroyed the original in bad faith.[127] The order of preliminary proof is of little consequence in Mississippi, save that the proponent must provide the court with evidence of the original's existence[128] and absence[129] to establish the proper

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discovery which the nature of the case would naturally suggest, and which were accessible to him.' " Simpson v. Dall, 70 U.S. (3 Wall.) 460, 475 (1865). Many state court decisions have held that the last custodian of the document must be produced at trial. 4 J. Wigmore, *supra* note 1, § 1195, at 444 n.1. Weinstein, however, asserts that under the federal rules "production of the custodian is not required" and that hearsay as to the inquiry made of him should be admitted. 5 Weinstein's Evidence ¶ 1004(1)[05], at 1004-20 (1976). For a discussion of the effect of a custodian's hearsay declarations, see note 118 *supra.*

[123] 5 Weinstein's Evidence ¶ 1004(1)[04], at 1004-14, -16 (1976).

[124] The Federal Rules of Evidence do not recognize degrees of secondary evidence. Fed. R. Evid. 1004, Advisory Comm. Notes.

[125] United States v. Gerhart, 538 F.2d 807, 809 (8th Cir. 1976); *see* Klein v. United States, 176 F.2d 184, 188 (8th Cir.) (stipulation of unavailability of the original permitted introduction of copies into evidence), *cert. denied,* 338 U.S. 870 (1949).

[126] *See* Bolden v. Gatewood, 250 Miss. 93, 115-16, 164 So. 2d 721, 730-31 (1964) (secondary evidence of contents of insurance agreement admissible on showing of loss); Davis v. Agents Fin. Corp., 249 Miss. 839, 845, 164 So. 2d 449, 452 (1964) (secondary evidence of promissory note admissible on showing of loss); Scott v. Loomis, 21 Miss. (13 S. & M.) 635, 640-41 (1850) (general rule stated); Freeland v. M'Caleb, 3 Miss. (2 Howard) 756, 767 (1838) (same).

[127] Stanton v. Cox, 162 Miss. 438, 454-55, 139 So. 458, 462 (1932); *see* Phillips v. Cooper, 50 Miss. 722, 732 (1874) ("parol proof . . . was admissible . . . under circumstances not implicating the party claiming the benefit of such testimony, in being instrumental in the loss").

[128] The necessity of proving that the original document existed has been the basis of several Mississippi decisions. In Eakin v. Vance, 18 Miss. (10 S. & M.) 549 (1848), the court held that parol evidence was inadmissible to prove the existence of a court order for the sale of land since, if any such order was made, it should have been placed on record. *Id.* at 552. But, in Davis v. Agents Fin. Corp., 249 Miss. 839, 164 So. 2d 449 (1964), an affidavit setting out the content of a lost promissory note was held sufficient to meet a statutory requirement, Miss. Code Ann. § 11-7-45 (1972) (copy of the writing on which

foundation. The Mississippi Supreme Court permits the use of circumstantial evidence to show the foundation requirement of a diligent and unsuccessful search for the document in the absence of direct evidence of loss or destruction.[130] Hurdling this initial condition is complicated by the inadmissibility of hearsay statements made by the document's last custodian for purposes of showing loss or destruction.[131] With the exception of this one point, Mississippi closely follows the established federal rules.

Rule 1004(2). Original Not Obtainable by Judicial Process[132]

Even if the original has not been lost or destroyed, secondary evidence of its contents is admissible under the federal rule when the

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an action is based must be attached to the declaration). 249 Miss. at 845, 164 So. 2d at 451-52. In another interesting case, the court dealt with the existence and destruction of a series of letters whose contents the plaintiff sought to prove in a suit for alienation of affection. Stanton v. Cox, 162 Miss. 438, 139 So. 458 (1932). The letters were written by the defendant who was charged with stealing the plaintiff's husband. When the plaintiff found the letters, she made copies of them, which she retained even after she and her husband had reconciled. The incriminating originals were burned by the husband in the wife's presence to strengthen the reconciliation. When the marriage failed again and the affair resumed, the offended wife brought an action and proved the letters by her copies. The court said that secondary evidence is inadmissible if "the destruction . . . be intentional, and for fraudulent purposes, and for the purpose of producing a wrong to the opposite party. [But] the secondary evidence is competent if the act in destroying the primary evidence is consistent with an honest purpose." The husband's destruction was honestly motivated. *Id.* at 454-55, 139 So. at 462.

[129] *Cf.* Davanny v. Koon, 45 Miss. 71, 77 (1871) (absence of the original must be accounted for before secondary evidence may be introduced).

[130] *See* Bolden v. Gatewood, 250 Miss. 93, 116, 164 So. 2d 721, 731 (1964) ("The question is always one of diligence in the effort to procure the original."); Freeland v. M'Caleb, 3 Miss. (2 Howard) 756, 767 (1838) ("To prove loss of a written instrument, it must be shown, that diligent search and inquiry has been made . . . ."). The sufficiency of the search, of course, depends on the circumstances of the case. *See* McCaughan v. Young, 85 Miss. 277, 288, 37 So. 839, 840 (1905) (under circumstances of great lapse of time and changes brought about by death, proof was sufficient for admission of secondary evidence); Page v. State, 59 Miss. 474, 479-80 (1882) (sufficiency of search depends on circumstances "too numerous to mention"; the rule for sufficiency is that there is no rule). The *Page* court enumerated the following factors as germane to the determination of whether a search for a missing original was sufficient: (1) character of the document, (2) length of time since the original was last seen, (3) the probable place of its deposit, and (4) the habits of its custodian in preserving other papers. *Id.*

[131] *See* Moore v. State, 179 Miss. 268, 273-74, 175 So. 183, 183-84 (1937) (marshal's testimony, concerning declarations made by custodian of the original, in an effort to show sufficient search was held inadmissible as hearsay).

[132] Fed. R. Evid. 1004(2) provides: "The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if . . . [n]o original can be obtained by any available judicial process or procedure . . . ." See Evidence 🔑 176-87.

original cannot be obtained by any available judicial process.[133] The discovery procedures available in both the federal and state courts will alleviate much of the necessity for reliance on secondary evidence if the original can be obtained by subpoena duces tecum at deposition.[134]

Mississippi probably does not recognize this exception to the best evidence rule, a conclusion which is drawn from the Mississippi Supreme Court's language in *Federal Chemical Co. v. Jennings.*[135] Jennings claimed that he was not liable on an open account because he had been released from the debt. He sought to prove the release by testimony. The plaintiff's objection to the testimony demanding that the release be presented was overruled on the grounds that the release was in the defendant's desk drawer in Kentucky and thus out of the trial judge's control.[136] The supreme court reversed, declaring:

> It seemed to have been the trial court's opinion that oral evidence of the contents of a writing could be given, when it appeared that the writing was without the territorial jurisdiction of the trial court. . . . So far as our investigations lead, this ruling of the trial judge was unique and announces a brand new rule of evidence. We . . . decline to endorse his reasoning.[137]

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[133] FED. R. EVID. 1004(2). Taken literally, the rule would require the proponent to exhaust all available means of judicially obtaining the original. Weinstein suggests that the phrase "to the extent practicable and reasonable" should be judicially construed into the rule, possibly through the court's discretionary powers given by rule 102, which requires fairness in administration and elimination of unjustifiable expenses. 5 WEINSTEIN'S EVIDENCE ¶ 1004(2)[01], at 1004-24 (1976). Therefore, the major obstacle the proponent will encounter in utilizing this exception to the best evidence rule is determining what the court considers to be the parameters of the term "judicially unobtainable." *Id.* Early federal decisions indicated that courts will be reasonable in establishing the proponent's burden of proving inaccessibility. *See, e.g.,* Vierech v. United States, 139 F.2d 847, 850 (D.C. Cir.) (allowed admission of secondary evidence of letters located in Nazi Germany in 1944 without a showing of unavailability), *cert. denied,* 321 U.S. 794 (1944); O'Shea v. United States, 93 F.2d 169, 171 (6th Cir. 1937) (secondary evidence of bank records admitted). *See generally* Landay v. United States, 108 F.2d 698, 704 (6th Cir. 1939). In criminal cases much less of a showing that material cannot be obtained is required because of the narrow scope of criminal discovery. 5 WEINSTEIN'S EVIDENCE ¶ 1004(2)[01], at 1004-26 (1976). Similarly, since privileged material is not subject to discovery, a claim of privilege will excuse production of the original. *Id.* Weinstein also predicts courts will not require unreasonable efforts to procure an original before secondary evidence of its contents will be received. *Id.; see* United States v. Haugen, 58 F. Supp. 436, 439 (E.D. Wash. 1944), *aff'd,* 153 F.2d 850 (9th Cir. 1946) (the original of a contract was not required to be produced by the government because it contained secret information).

[134] FED. R. CIV. P. 30(b)(1), 45(d)(1); MISS. CODE ANN. § 11-1-51 (Supp. 1977).

[135] 112 Miss. 513, 73 So. 567 (1917).

[136] *Id.* at 515, 73 So. at 568.

[137] *Id.* Although *Jennings* is distinguishable because the document was in the proponent's control, the general reasoning of the court is consistent with similar opinions dealing with availability and scope of jurisdictional authority. *See, e.g.,* Smith v. State, 247 So. 2d 705, 706 (Miss. 1971) (witness' moving outside court's subpoena jurisdiction did

A conflicting inference may be drawn from *Wooldridge v. Wilkins*,[138] in which the court held that secondary evidence was not admissible because judicial process had not been sought as a means of obtaining the original.[139] Presumably, if a subpoena duces tecum had failed to produce the original, secondary evidence would have sufficed.

Rule 1004(3). Original in Possession of Opponent[140]

At common law, when an original document was in the hands of an opponent who had notice that its contents would be the subject of proof at a hearing, secondary evidence of the original's contents was admissible if the opponent refused to produce the original in court.[141] The rule was subsequently accepted at the federal[142] and state[143] levels before being incorporated into the Federal Rules of Evidence.[144] The proponent must establish three elements before being allowed to introduce secondary evidence under this exception: (1) effective control by the opponent, (2) notice to the opponent that the original is needed in court, and (3) the opponent's failure to produce the original in court.[145] Because of the rule's unspecific language regarding notice,[146] it is impossible to set a precise rule governing the form or time of notice required.[147] Still, some points are clear. It is not necessary that the notice compel production[148] since the proponent has copies available as secondary evidence if the

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not make him unavailable for purposes of meeting former testimony exception to the hearsay rule).

[138] 4 Miss. (3 Howard) 360 (1839).

[139] *Id.* at 367.

[140] Fed. R. Evid. 1004(3) provides:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]t a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing . . . .

See Evidence 🔑 176, 179, 184-85.

[141] 4 J. Wigmore, *supra* note 1, §§ 1199-1210, at 460-85.

[142] *See, e.g.*, Jones v. Atlantic Ref. Co., 55 F. Supp. 17, 20-21 (E.D. Pa. 1944) (employer's failure to produce records made secondary evidence of their contents admissible in Jones Act litigation).

[143] *See* Aetna Life Ins. Co. v. Thomas, 166 Miss. 53, 59-60, 144 So. 50, 52 (1932) (secondary evidence of contents of letter admissible after notice to insurance company and failure to produce).

[144] Fed. R. Evid. 1004(3); *accord*, United States v. Levine, 546 F. 2d 658, 668 (5th Cir. 1977).

[145] 5 Weinstein's Evidence ¶ 1004(3)[01], at 1004-27 (1976). The sufficiency of the proponent's proof showing effective control by the opponent is a question for the court. *Id.*

[146] *See* Fed. R. Evid. 1004(3) ("notice, by pleadings or otherwise").

[147] *See generally* 5 Weinstein's Evidence ¶ 1004(3)[01], at 1004-27 to -29 (1976).

[148] C. McCormick, *supra* note 1, § 239, at 573.

originals are not presented.[149] If the original document is available at trial and in possession of the opponent, notice can be given then.[150] Finally, a defendant in a criminal case should not be asked in the presence of the jury to produce any document because his failure to comply with the request would likely prejudice his case.[151]

Mississippi follows the rule 1004(3) exception.[152] The bulk of Mississippi litigation on this point has centered around the sufficiency of notice to produce. Notice must be timely,[153] must allow reasonable time for production,[154] and must be given prior to the opening of the trial.[155] Sufficiency of notice is a preliminary question of fact for the trial court.[156]

Rule 1004(4). Collateral Matters[157]

When the contents of a document sought to be established are not closely related to the main issues in a case, secondary evidence is ordinarily receivable.[158] The reason for such a rule is best stated by Professor McCormick.

> At nearly every turn in human affairs some writing—a letter, a bill of sale, a newspaper, a deed—plays a part. Consequently any narration by a witness is likely to include many references to transactions consisting partly of written communications or other writings. . . . Recognition of an exception exempting "collateral writings" from the operation of the basic rule has followed as a necessary concession to expedition of trials and clearness of narration, interests which outweigh, in the case of merely incidental references to documents, the need for perfect exactitude in the presentation of these documents' contents.[159]

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[149] *Id.*

[150] 2 S. Gard, *supra* note 1, § 7:20.

[151] 5 Weinstein's Evidence ¶ 1004(3)[01], at 1004-28 to -29 (1976).

[152] *See* Threatt v. Threatt, 212 Miss. 555, 562, 54 So. 2d 907, 910 (1951) (secondary evidence of contents of letter in possession of defendant admitted after notice to defendant and failure to produce); National Cash Register Co. v. Giffin, 192 Miss. 556, 562, 6 So. 2d 605, 606-07 (1942) (secondary evidence of contents of letter inadmissible in absence of notice to defendant to produce).

[153] National Cash Register Co. v. Giffin, 192 Miss. 556, 562, 6 So. 2d 605, 606-07 (1942) ("oral evidence of its contents was inadmissible in the absence of timely notice . . . to produce").

[154] Miller v. Cullifer, 159 Miss. 712, 715, 132 So. 327, 327 (1931) ("They should have been given notice and reasonable time within which to produce . . . .").

[155] *Id.*

[156] Aetna Life Ins. Co. v. Thomas, 166 Miss. 53, 60, 144 So. 50, 52 (1932).

[157] Fed. R. Evid. 1004(4) provides: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [t]he writing, recording, or photograph is not closely related to a controlling issue." See Evidence 🔑 171.

[158] 5 Weinstein's Evidence ¶ 1004(4)[01], at 1004-29 to -30 (1976).

[159] C. McCormick, *supra* note 1, § 234, at 565. "The rule provides another vehicle for

Consequently, when a witness refers to these collateral items in order to add clarity to his testimony, there is no need to require that the document be produced.[160]

Decisions preceding the adoption of the federal rules adhered to the precept that the original need not be produced if it is of only minor significance to the disposition of the controversy.[161] One of the few examples of this exception is found in *Blachly v. United States*,[162] where the court refused to require production of promissory notes that were the fruits of a mail fraud scheme. "The notes were only collaterally involved and were introduced, not for the proof of their exact terms, but rather only to show the method by which the scheme was effected."[163] *Blachly* illustrates two important problems of the collateral matter limitation. First, although the exception's existence is acknowledged, its application is elusive,[164] and second, the limitation is in reality a restatement of the proof of contents restriction.[165] While rule 1004(4) codifies the collateral matter exception, it continues the vagueness of preexisting law by leaving the term "collateral" undefined, reserving specific applications of the concept to judicial discretion.[166]

Mississippi's development of the collateral matter exception has paralleled that of the federal courts. Like its federal counterparts, the Mississippi court has recognized the limitation without establishing its parameters. *Tallahatchie Lumber Co. v. Cecil Lumber Co.*[167] was an action for breach of a lumber contract in which a contract for the resale

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the exercise of common sense." 5 WEINSTEIN'S EVIDENCE ¶ 1004(4)[01], at 1004-32 (1976).

[160] *See* Comment, *Best Evidence and Authentication of Documents,* 21 LOYOLA L. REV. 450, 451 (1975) (rule aids trial expediency). For example, a witness' testimony that he remembered the date of an automobile accident because it was the day he bought his house does not require production of the sales contract or deed. For additional examples, see C. MCCORMICK, *supra* note 1, § 234, at 565 n.47.

[161] *See, e.g.,* Reistroffer v. United States, 258 F.2d 379, 394 (8th Cir. 1958) (testimony about contents of local newspaper reports did not violate best evidence rule because the newspaper reports were collateral matters); United States v. Aluminum Co. of America, 35 F. Supp. 820, 827 (S.D.N.Y. 1940) (best evidence rule not applicable to collateral matters); *cf.* United States v. Duffy, 454 F.2d 809, 812 (5th Cir. 1972) (inscribed chattel need not be produced because it was "by no means central or critical to the case").

[162] 380 F.2d 665 (5th Cir. 1967).

[163] *Id.* at 674 n.18.

[164] *See, e.g.,* 4 J. WIGMORE, *supra* note 1, § 1253, at 595 ("The term 'collateral,' however, as a definition of the limits of this exception, is an unfortunate and elusive word, which is almost impossible of consistent application in practice.").

[165] *See* 5 WEINSTEIN'S EVIDENCE ¶ 1004(4)[01], at 1004-31 (1976) (author concludes that best evidence rule would not apply to *Blachly* if the notes were not introduced to prove their contents).

[166] *See generally* FED. R. EVID. 1004(4), Advisory Comm. Note; 5 WEINSTEIN'S EVIDENCE ¶ 1004(4)[01], at 1004-30 to -31 (1976).

[167] 124 Miss. 897, 87 So. 449 (1921).

of the lumber did not have to be produced because "it was only collaterally involved."[168]

Rule 1005. Public Records[169]

The Federal Rules of Evidence except from the requirement of an original copies of official records and documents which have been either recorded or filed.[170] This exception promotes the efficient operation of public offices by avoiding the continual transfer of important public records to and from the courtroom.[171] The term official record offers the most fertile ground for litigation under rule 1005. Wigmore speculated that official records in this context are "documents belonging in *any public office*."[172] Early federal decisions modified the Wigmore test to state that a record or paper was official when it reflected "work done by a person in the employment of the government in the course of the performance of the duties of his position,"[173] regardless of whether the document was actually available to the public.[174] Despite the conflicts, there appears to be no real controversy since most courts have defined the term liberally in favor of inclusion.[175]

When a properly authenticated copy of an official record or recorded document cannot be obtained after due diligence, rule 1005 permits other evidence of contents to be admitted. Weinstein suggests that other evidence includes duplicates, uncertified copies, and all forms of oral testimony.[176] Although recognizing the inconsistent treatment, the drafters of rule 1005 felt that the "[r]ecognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original."[177]

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[168] *Id.* at 908, 87 So. at 451.

[169] Fed. R. Evid. 1005 provides:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

See Criminal Law 🔑 429-30; Evidence 🔑 175, 325-37, 340-42, 344-49, 366-67; Federal Civil Procedure 🔑 1189-90.

[170] Fed. R. Evid. 1005; *see* United States v. Rodriguez, 524 F.2d 485, 488 n.6 (5th Cir. 1975) (admission of vehicle registration on public record), *cert. denied,* 424 U.S. 972 (1976); United States v. Farris, 517 F.2d 226, 228 (7th Cir.) (admission of official certified computer data on income tax filings), *cert. denied,* 423 U.S. 892 (1975).

[171] 5 Weinstein's Evidence ¶ 1005[01], at 1005-3 (1976); 4 J. Wigmore, *supra* note 1, § 1218, at 501-02.

[172] 4 J. Wigmore, *supra* note 1, § 1218, at 501.

[173] United States v. Aluminum Co. of America, 1 F.R.D. 71, 75 (C.D.N.Y. 1939).

[174] Banco de Espana v. Federal Reserve Bank, 114 F.2d 438, 446 (2d Cir. 1940).

[175] 5 Weinstein's Evidence ¶ 1005[03] (1976); *see* Fed. R. Civ. P. 44 (proof of official records); Fed. R. Evid. 901, 902 (authentication and identification of public records).

[176] 5 Weinstein's Evidence ¶ 1005[06], at 1005-12 (1976).

In Mississippi the admission of copies of public records as substitutes for the originals is governed almost entirely by statute. These statutes authorize the use of copies of public records properly certified by the office where they are recorded,[178] and the admissibility of United States records.[179] Likewise, they provide for the admission of copies of the records and documents preserved by the director of the Department of Archives and History on his certificate,[180] court costs bills,[181] records of a county court or board,[182] maps, plots, or writings permitted or required to be recorded in this state,[183] similar recordings of other states,[184] recorded writings of foreign countries,[185] marriage certificates,[186] wills,[187] books of entries of land,[188] field notes of surveys and township and sectional maps,[189] and appointments of a foreign executor, administrator, or guardian.[190] Even where no statute was found to be controlling, the Mississippi courts have granted secondary evidence of public documents preferential treatment.[191]

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[177] FED. R. EVID. 1005, Advisory Comm. Notes.

[178] MISS. CODE ANN. § 13-1-77 (1972).

[179] *Id.* § 13-1-79 (officer in charge of record must certify the copy).

[180] *Id.* § 13-1-85.

[181] *Id.* § 13-1-93 (certification required).

[182] *Id.* § 13-1-95 (county board must have ordered transcription of records).

[183] *Id.* § 13-1-97 (certification by clerk in whose office records are kept is required).

[184] *Id.* § 13-1-99 (certified by officer in whose office record is kept); *see* General Acceptance Corp. v. Halbrook, 254 Miss. 78, 81, 179 So. 2d 845, 846 (1965) (dictum) (authentication of writing recorded by laws of any other state; proceeding either under state statute or federal act). *But see* Wallace v. Herring, 207 Miss. 658, 670, 43 So. 2d 100, 102-03 (1949) (necessity for compliance with act of Congress).

[185] MISS. CODE ANN. § 13-1-101 (1972) (certified by officer having custody of record); *see* McLeod v. Bridges, 180 Miss. 585, 588, 178 So. 321, 321 (1938) (Arkansas death certificate admitted).

[186] MISS. CODE ANN. § 13-1-103 (1972) (certification of clerk required); *see* Harkins v. Cole, 200 Miss. 698, 700-01, 28 So. 2d 839, 840 (1947) (certificate of circuit clerk as to his interpretation of a marriage record in his office did not satisfy the statutory requirement).

[187] MISS. CODE ANN. § 13-1-105 (1972) (certification of clerk required).

[188] *Id.* § 13-1-107 (certification of officer having charge thereof required).

[189] *Id.* § 13-1-109 (certification by land commissioner or other officer having custody required).

[190] *Id.* § 13-1-117 (certified by chancery clerk in whose office record is filed).

[191] *See, e.g.*, Hatrak v. Hatrak, 206 Miss. 239, 255, 39 So. 2d 779, 781 (1949) (certificate of clerk of foreign court attesting to payments made under divorce decree for child support were presumed correct); Myrick v. Mansell, 184 Miss. 701, 704, 184 So. 447, 448 (1938) (copy of justice of the peace judgment admissible without producing original).

Rule 1006. Summaries[192]

The best evidence rule has traditionally been modified to permit a litigant to prove the contents of voluminous writings not amenable to examination in court by presentation of summaries of their contents derived from an inspection of the documents.[193] This exception was developed not only for the sake of convenience but also because summaries are often the only practical means of proving the contents of voluminous writings.[194] Prior federal cases adopted this position,[195] and rule 1006 does not depart from it.

As a precaution to the use of summaries, rule 1006 also adopts the common law[196] and prior federal case law positions[197] allowing the court to order the production of the originals or duplicates in court[198] and requiring that they be made available to the opposing party for examination, copying, or both as a condition precedent to the summaries' admission.[199] Previously, a summary was admissible in evidence only after a foundation was established showing that the summary accurately reflected the contents of the document from which it was drawn.[200] Whether the proper foundation had been laid was within the court's discretion.[201] By judicial construction, rule 1006 has incorporated these concepts.[202]

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[192] Fed. R. Evid. 1006 provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

See Criminal Law 🔑 400(8); Evidence 🔑 177, 188.

[193] 4 J. Wigmore, *supra* note 1, § 1230, at 535.

[194] *Id.*

[195] *See* Case & Co. v. Board of Trade, 523 F.2d 355, 361 (7th Cir. 1975) (list of emergency action of board of directors admissible as a summary of voluminous evidence). In addition to the traditional application to writings, rule 1006 recognizes existing federal case authority, *see* Sam Macri & Sons, Inc. v. United States *ex rel.* Oaks Constr. Co., 313 F.2d 119, 128-29 (9th Cir. 1963) (summary of work done compiled from voluminous files admissible under "long established" rule); Augustine v. Bowles, 149 F.2d 93, 96 (9th Cir. 1945) (charts and schedules of voluminous documents necessary to litigation admissible), and expands the common law definitions of summaries to include charts and calculations, and writings to include recordings and photographs, Fed. R. Evid. 1006; *see* United States v. Denton, 556 F.2d 811, 816 (6th Cir.) (summary of tape recordings of phone conversations admissible in criminal prosecution for gambling operation), *cert. denied,* 98 S. Ct. 269 (1977).

[196] *See* 4 J. Wigmore, *supra* note 1, at § 1230, at 535 (majority of courts required that originals be brought into court or at least be made available to opposing party for examination).

[197] *See, e.g.,* Gordon v. United States, 438 F.2d 858, 876-77 (5th Cir.) (best practice requires the original be made available to opposing party to test accuracy of summary on cross-examination), *cert. denied,* 404 U.S. 828 (1971); Ryder Truck Rental, Inc. v. National Packing Co., 380 F.2d 328, 334 (10th Cir. 1967) ("Summaries . . . are admissible upon ' . . . condition that the mass of data shall, if the occasion seems to require it, be placed at hand in court or at least be made accessible to the opposing party.'"); Sylvania Elec. Prod., Inc. v. Flanagan, 352 F.2d 1005, 1007-08 (1st Cir. 1965) (summaries inadmissible where not made available to the opponent, except where originals can be shown to be genuinely lost or destroyed).

[198] The Fifth Circuit has interpreted rule 1006 as allowing the judge to choose between admitting the summaries as evidence and excluding the original documents or admitting the original documents into evidence and instructing the jury that the summaries are not

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evidence. In United States v. Smyth, 556 F.2d 1179 (5th Cir.), *cert. denied,* 98 S. Ct. 190 (1977), the court declared:

> Implicit in Rule 1006 is the notion that the trial judge may choose this alternative. In the circumstances of a given case the court may feel that the jury, or the court, itself, in a bench trial, ought to consider the source documents in resolving a fact issue and that, on balance, a summarization of such evidence would add to or detract from the proper weight or emphasis to be given it.

556 F.2d at 1184 n.11.

[199] An illustrative case is Atlantic & Pac. Ins. Co. v. Combined Ins. Co. of America, 312 F.2d 513 (10th Cir. 1962). In this action for unfair competition, the plaintiff alleged that the defendant lured away some of its sales personnel who took with them confidential information belonging to the plaintiff. Plaintiff offered a summary of its business records attempting to prove its business losses. With the originals present in court, the defendant was given an opportunity to examine them, and the trial court even offered to grant a reasonable continuance for it to do so. On appeal, the summaries were held properly admitted by the trial court. *Id.* at 516.

Rule 1006's reference to "reasonable time and place" of the opposing party's right to examine the originals has been interpreted to mean the opponent of the summary should be given sufficient time to examine the proposed evidence and prepare any necessary challenges to the summary's accuracy. *See* United States v. Denton, 556 F.2d 811, 816 (6th Cir.) (appellants had one month to offer proof that summary of recording had been improperly prepared; thus "reasonable time and place" requirement was satisfied), *cert. denied,* 98 S. Ct. 269 (1977). The court-production and opponent-examination requirements incorporated in rule 1006 also act as possible discovery devices that are not limited by the opponent's failure to request the material under federal discovery rules, *see generally* FED. R. CIV. P. 34 (allows inspection of writings without court order); FED. R. CRIM. P. 16 (gives judge discretion to allow defendant to inspect or copy statements made by him in possession of government), or by the fact that the original material later becomes part of a summary, chart, or calculation, 5 WEINSTEIN'S EVIDENCE ¶ 1006[04], at 1006-8 (1976).

[200] *See* Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 301 (3d Cir. 1961) (showing must be made that summary accurately reflects contents of originals before it is admissible).

[201] Standard Oil Co. v. Moore, 251 F.2d 188, 222-23 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958).

[202] *See* United States v. Denton, 556 F.2d 811, 816 (6th Cir.) (court did not abuse its discretion in admitting composite tape after prosecution laid proper foundation of accuracy), *cert. denied,* 98 S. Ct. 269 (1977). One key concern in the use of summaries is their accuracy. Rule 1006 is silent as to the proper procedure for establishing the accuracy of a summary. There are at least 3 approaches to this requirement. In United States v. Smyth, 556 F.2d 1179, 1183-85 (5th Cir.), *cert. denied,* 98 S. Ct. 190 (1977), the court held that summaries should be considered as evidence and interpreted rule 1006 to require a pretrial

For a party to gain admission of a summary the originals on which the summary is based must also be admissible themselves.[203] In addition, a summary is not admissible if it contains information not obtained from the originals.[204] Summaries may also be introduced without reliance on rule 1006 through the use of the lost or destroyed exception[205] or the public records exception[206] if their specific requirements are met.

The seminal case recognizing the use of summaries in Mississippi is *State v. Lewenthall*,[207] where the court endorsed the concept that testimonial and written compilations that accurately reflect the contents of voluminous material are admissible,[208] conditioned upon the presentation of authenticating testimony from the one preparing the

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disposition of any issues concerning authenticity of the summary. "By requiring that the underlying documents be made available to opposing counsel, the rule encourages counsel to eliminate objectionable matter and to stipulate to the form of the summary." 556 F.2d at 1184 n.12. United States v. Denton, 556 F.2d 811, 815-16 (6th Cir.), *cert. denied*, 98 S. Ct. 269 (1977), adopted the prerule position that the preparer of the summary should testify to the accuracy of the summary at trial. Weinstein takes the pivotal position that any issue of authenticity under rule 1006 should be disposed in pretrial proceedings. If pretrial disposition fails, the opponent should be allowed to cross-examine the preparer or present rebuttal evidence with the judge instructing the jury "to consider the accuracy of the material contained in a chart, summary, or calculation before accepting the material as a truthful representation of the facts sought to be proven." 5 WEINSTEIN'S EVIDENCE ¶ 1006[06], at 1006-11 (1976).

[203] *See, e.g.*, Wilkes v. United States, 80 F.2d 285, 291-92 (9th Cir. 1935) (summaries of books inadmissible because books themselves were inadmissible). Under this rule, if the original materials are inadmissible because they contain hearsay, then summaries of the originals are also inadmissible. *See, e.g.*, Morton Butler Timber Co. v. United States, 91 F.2d 884, 889 (6th Cir. 1937) (tally sheets containing hearsay not admissible under business records exception; summaries made therefrom were also inadmissible). However, if the summary based on an original containing hearsay is relied upon by an expert giving testimony, then the originals need not be introduced, and the summary is admissible under FED. R. EVID. 703. 5 WEINSTEIN'S EVIDENCE ¶ 1006[03], at 1006-6 (1976). Finally, rule 1006 bars summaries based on privileged material which is inadmissible as self-incriminating. *Id.*

[204] *See, e.g.*, Standard Oil Co. v. Moore, 251 F.2d 188, 223 (9th Cir. 1957) (summaries of tax returns not wholly drawn from original ledger inadmissible), *cert. denied*, 356 U.S. 975 (1958). It is reasonable to expect courts will construe rule 1006 to encompass both the admissibility of the original requirement and the rule excluding summaries containing extraneous information since these concepts have historically governed the admissibility of summaries. *See* United States v. Smyth, 556 F.2d 1179, 1184 (5th Cir.) (judicial construction of rule in part "compelled by rule's history"), *cert. denied*, 98 S. Ct. 190 (1977); FED. R. EVID. 1006, Advisory Comm. Notes (rule recognizes practice of admitting summaries "with appropriate safeguards").

[205] *E.g.*, Sylvania Elec. Prod., Inc. v. Flanagan, 352 F.2d 1005, 1007-08 (1st Cir. 1965) (summaries inadmissible unless originals are shown to be lost or destroyed); *see* FED. R. EVID. 1004(1).

[206] 5 WEINSTEIN'S EVIDENCE ¶ 1006[05], at 1006-9 (1976); *see* FED. R. EVID. 1005.

[207] 55 Miss. 589 (1878).

[208] *Id.* at 592.

summary and the availability to the opponent of both original and summary.[209] The requirements were imposed so that the opponent might have an opportunity to compare the originals to the summary as a prelude to his cross-examination of the preparer.[210] In establishing these guidelines for the use of summaries, Mississippi was one of the jurisdictions which followed the so-called restrictive view concerning their evidentiary status. Summaries were considered as aids to the jury enabling it to evaluate more easily the proof contained in the maze of documents.[211] Consequently, the original documents had to be admitted in evidence as a condition precedent to the introduction of the summary.[212] Implicit in this logic is the correlative view that, before a summary may be introduced, the proper foundation must be laid for the admission of its underlying original.

In 1932, the Mississippi Supreme Court added a new twist to the law regarding the use of summaries. In the unusual, but still controlling, case of *Crawford v. State*,[213] the court announced that voluminous material may not be introduced unless it is accompanied by summaries. Furthermore, failure to include a summary meant that the data contained in the voluminous exhibit will be deemed as not having been proved.[214] Apart from this unusual compulsory feature, *Crawford* suggests that the requirements enunciated in *Lewenthall* were to be continued.[215] Thus, while summaries are required to accompany most voluminous material introduced in evidence, the summary must still run the gauntlet of common law admissibility requirements that necessitate authenticating testimony and availability to the opponent. It can be concluded, therefore, that *Crawford* subsumed all the *Lewenthall* requirements[216] and imposed the additional mandate that a summary be included.[217]

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[209] *Id.*

[210] *Id.*

[211] *See* State v. Lewenthall, 55 Miss. 589, 592 (1878) ("Such testimony is admissible only in connection with the writings themselves, where they can be produced, and as an aid to an intelligent comprehension of them by the jury.").

[212] *Id.* ("It is very clear that, without offering the receipts themselves in evidence, it was not admissible for witnesses to give evidence of what they contained, and of their result.").

[213] 162 Miss. 158, 138 So. 589 (1932).

[214] *Id.* at 163-64, 133 So. at 590; *accord*, Bridges v. City of Biloxi, 250 Miss. 717, 722-24, 168 So. 2d 40, 41-42 (1964); Gulf M. & O.R.R. v. Luter Motor Express, 190 Miss. 523, 532, 1 So. 2d 231, 233 (1941); Chas. Weaver & Co. v. Phares, 185 Miss. 224, 233, 188 So. 12, 13 (1939).

[215] *Crawford* explicitly requires that the proper foundation of accuracy be established by the testimony of the preparer, 162 Miss. at 163-64, 138 So. at 590; *cf.* Cannady v. Espey, 230 Miss. 355, 360, 93 So. 2d 453, 456 (1957) (accuracy established if summaries are "substantially identified"), but the common law requirement that the originals be made available to the opponent is not explicitly stated. The conclusion is inescapable, however, that there is such a requirement implied in *Crawford* since the court intended "cross-examination . . . to search into the soundness of the compilations or schedules and of the conclusions sought to be established." 162 Miss. at 164, 138 So. at 590. The effectiveness of cross-examination would be nonexistent unless the originals were available for inspection prior to the preparer's testimony.

Mississippi also allows summaries of evidence to be read by the preparer to a grand jury. In *Simmons v. State*,[218] the court held that the reading of a summary to the grand jury does not require the quashing of an indictment simply because the summary before the grand jury contained hearsay evidence.[219] As a safeguard, however, *Simmons* incorporates the *Crawford* requirements concerning the admissibility of the summaries.[220]

The Mississippi requirements of authenticating testimony and availability to the opponent are consistent with the requirement of accurate presentation of evidence, while the announcement of compulsory summaries is grounded on nothing more than expediency.[221] Care should be taken not to extend expediency to a point that it forces a party to relinquish the right to present all relevant evidence. Furthermore, if the supreme court is intent on continuing the summary requirement, it should go the added step and allow the summary to be treated as evidence. Presently, the summary is qualified merely as a jury aid since the underlying originals must be produced as evidence.[222] This approach is questionable because the availability of a summary is a sufficient reason to avoid sifting through massive documents. Furthermore, it is realistic to expect the trier of fact will use the summary and disregard the voluminous originals. With the present safeguards required for preparation of summaries,[223] treating them as evidence would be both reasonable and logical.

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY[224]

At common law, a writing's contents could be proved by testimony that the party against whom the writing is offered had admitted the truth of its contents.[225] The Federal Rules of Evidence adopt a stricter approach and permit the use of an admission of contents only when it has been made either in sworn testimony or in writing by the party against whom it is offered.[226] The federal rules' position is more consistent with the contemporary judicial policy of ensuring accuracy because the common law admitted evidence that was subject to errors by being twice removed from the original: a witness' account of a party's admission of the contents of the original.[227]

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[216] The only problem with this conclusion is that *Crawford* does not cite *Lewenthall* and, in fact, cites no authority for its conclusions. 162 Miss. at 164, 138 So. at 590.

[217] The requirement of a summary was affirmed as recently as Bridges v. City of Biloxi, 250 Miss. 717, 722-24, 168 So. 2d 40, 41-42 (1964).

[218] 165 Miss. 732, 141 So. 288 (1932).

[219] *Id.* at 745-46, 141 So. at 290; *accord,* State v. Matthews, 218 So. 2d 743, 744 (Miss. 1969) (testimony based on summary not grounds to quash indictment).

[220] 165 Miss. at 745-46, 141 So. at 290.

[221] *See, e.g.,* Crawford v. State, 162 Miss. 158, 162-63, 138 So. 589, 590 (1932) (in phrasing the issue, the court questioned whether it should "be required . . . to take a box of books and papers and . . . make the tabulations and computations required" and also whether the same should be expected of the jury).

[222] See notes 211 through 217 and accompanying text *supra.*

[223] See notes 209 & 215 and accompanying text *supra.*

[224] FED. R. EVID. 1007 provides: "Contents of writings, recordings, or photographs may

One possible area of confusion is rule 1007's application to admissions made by the opponent's representatives.[228] Statements made by an officer or member of a corporation or partnership that constitute an admission of the contents of a writing at issue are admissible to prove contents,[229] as are statements of a representative, agent, or employee of the opponent.[230] In addition, an opponent's responses to written interrogatories and to requests for admissions under rules 33 and 36 of the Federal Rules of Civil Procedure can be used to prove contents of writings under rule 1007.[231]

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be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original." See Evidence 🔑 161(1), 172.

[225] *See* Slatterie v. Pooley, 151 Eng. Rep. 579, 580 (Exch. Ch. 1840) (testimony of an oral admission allowed to prove contents of writing). The holding carried over to many American jurisdictions. C. McCormick, *supra* note 1, § 242, at 577 n.23; *see, e.g.*, Metropolitan Life Ins. Co. v. Hogan, 63 F.2d 654, 656 (7th Cir. 1933) (oral admission by agent regarding contents of paper received from beneficiary was competent evidence).

[226] Fed. R. Evid. 1007.

> In practice this restriction works little hardship on the party seeking to prove contents because, if the adverse party's statement is held inadmissible for that purpose, the party seeking to prove contents may always introduce the originals as evidence. Should the originals be lost, destroyed, or unavailable, an adverse party's oral, extrajudicial admission of the contents may be introduced as other evidence of contents under Rules 1004 or 1005.

5 Weinstein's Evidence ¶ 1007[02], at 1007-6 (1976).

[227] C. McCormick, *supra* note 1, § 242, at 577.

[228] 5 Weinstein's Evidence ¶ 1007[04], at 1007-8 (1976).

[229] *Id.*; *see, e.g.*, Dunbar v. United States, 156 U.S. 185, 196 (1895) (oral admission that telegram received was identical to one sent by the party, held properly admitted in evidence).

[230] 5 Weinstein's Evidence ¶ 1007[04], at 1007-8 (1976); *see* Fed. R. Evid. 801(d)(2) (admissibility of statement on matter within scope of employment or agency). The definitions of rule 801(d)(2) govern the admission which may be introduced in evidence under rule 1007. 5 Weinstein's Evidence ¶ 1007[04], at 1007-8 (1976).

[231] 5 Weinstein's Evidence ¶ 1007[05], at 1007-9 (1976). "A party can avoid the time-consuming process necessary to authenticate and prove contents of writings, recordings, or photographs if he makes proper use of the Federal rules of discovery in concert with Rule 1007." *Id.*

Only one Mississippi case speaks to the situation covered by rule 1007. In the 1859 case *Williams v. Brickell*,[232] Dr. Brickell attempted to recover for medical services rendered. He contended that Williams was liable for the services because he had sent a telegram requesting that a doctor come immediately to attend yellow fever victims in the area. The telegram was not admitted in evidence, although Brickell's witness testified that he had delivered it to Brickell. The witness also knew and testified to contents of the telegram. The defendant objected to the testimony since the original document was not in evidence and its absence had not been accounted for.[233] The objection was overruled, and the defendant himself later testified to the circumstances of the case and included a description of the contents of the telegram.[234] The defendant appealed an adverse judgment, contending in part that the trial court had erroneously admitted the testimony about the telegram's contents when the document was not in evidence. The Mississippi Supreme Court held that the trial court's refusal to sustain the defendant's objection to the testimony under the circumstances was erroneous but that it was not grounds for reversal since the defendant had admitted the contents of the telegram in his testimony and thus had not been prejudiced by the trial court's error.[235]

Williams adopted the position that the contents of a writing could be proved in its absence when the party against whom it is offered admits to the contents in sworn testimony. This is one of the views incorporated into rule 1007 with its strict approach, and it is apparent that Mississippi was one of the forerunners in accepting what is now thought of as a contemporary policy. The major concern about *Williams* is that it was decided in 1859 and has not been subsequently cited.

RULE 1008. FUNCTIONS OF COURT AND JURY[236]

The line between preliminary factual questions for determination by the court in deciding admissibility[237] and factual questions relative to the issue at trial is admittedly thin. Yet, as rule 1008 recognizes, the distinction is real. Preliminary questions were traditionally left to the court because it was felt the jury would be confused by its inability to disregard the evidence if conditions of admissibility were not met. For example, consider the undesirable results of permitting a jury to determine whether a proponent of secondary evidence had made a diligent search for the missing original and then instructing the jury to disregard the evidence if it concluded that a diligent search had not been made. Rules of evidence are intended to be enforced by the court, not by the jury.[238]

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[232] 37 Miss. 682 (1859).

[233] *Id.* at 684.

[234] *Id.* at 684-85.

[235] For a discussion of the "strict approach," see notes 226 & 227 and accompanying text *supra*.

[236] FED. R. EVID. 1008 provides:

> When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

A problem arises, however, when the preliminary issue of fact coincides with the ultimate issue to be decided by the jury. This may occur when there is a dispute either over which of two writings produced at trial is the original or whether an original existed at all.[239] Under the guise of determining the admissibility of secondary evidence, the trial judge may determine that the original never existed, deny admission of the secondary evidence, and thus foreclose a jury determination of the ultimate issue, the existence of the document.[240] Rule 1008 requires that the jury determine questions relating to the relevance of the writing: whether it ever existed, whether another writing produced at trial is really the original, and whether the secondary evidence accurately depicts the contents of the original.[241]

No Mississippi cases have been found which analyze the respective roles of judge and jury in determining the preliminary questions of fact on which the admissibility of secondary evidence would turn. In the absence of such authority, Mississippi judges should consider adopting the position taken by the federal rules, especially in light of the compromise the rules make between the trial judge's duty of determining admissibility and the jury's right to decide ultimate issues of fact.

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[237] C. McCormick, *supra* note 1, § 53, at 121. *See generally* Galloway, *General Provisions*, 48 Miss. L.J. 901 (1977).

[238] C. McCormick, *supra* note 1, § 53, at 121-22.

[239] Comment, *supra* note 84, at 236.

[240] *Id.* The Advisory Committee supplied the following example:

> [P]laintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue.

Fed. R. Evid. 1008, Advisory Comm. Notes.

[241] 5 Weinstein's Evidence ¶ 1008[05], at 1008-19 (1976). *See* Fed. R. Evid. 1008, Advisory Comm. Notes ("This decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by judges over jury determinations.").

CONCLUSION

Article X of the Federal Rules of Evidence is indicative of the modernization of the venerable best evidence rule. This modernization not only acknowledges technological advances in the methods for the preservation and presentation of documentary evidence but also encompasses changes in the basic concept of the rule. The quest for the "best" is no longer the purpose of the rule. Furthermore, the production of the original is not recognized as an end in itself. The rule has now been hewed to the simple requirement of producing reliable information. The information presented may be an original or it may be a duplicate; the only requirement is that the party against whom it is offered does not dispute its accuracy. In the absence of a good faith dispute over the accuracy of the evidence, departures from the rubrics of the best evidence rule appear destined to be classified as harmless error. The Mississippi practitioner should find little difficulty in following Article X because of its similarity to state evidentiary practice.

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BOOK REVIEWS

Basic Text on Labor Law: Unionization and Collective Bargaining

By Robert Gorman
St. Paul: West Publishing Company
Pp. 914, $17.00

*W. Gary Vause**

Professor Robert Gorman's *Basic Text on Labor Law: Unionization and Collective Bargaining* will serve particularly well two prospective reading audiences. Students of labor law should find the text an invaluable aid in synthesizing National Labor Relations Board and court cases in the mainstream of federal labor law. Professor Gorman has written his book in a straightforward style that encourages use by those who are becoming acquainted with labor law principles, but he has not sacrificed that level of sophistication necessary to attract the reading audience seasoned by practical experience. Practitioners should find Professor Gorman's text a handy book for an occasional refresher or a source of alternative perspectives on labor law problems.

The broad subject of labor law cannot easily be treated within the narrow boundaries of a single volume. Professor Gorman has resisted the temptation to say something about everything on the expansive subject and has limited his treatise to the "traditional" labor law subjects of unionization and collective bargaining, with particular emphasis upon the National Labor Relations Act. Written within the parameters of this subject matter, the single-volume work is divided into nine major areas: "[1] Introduction: Labor law, the Federal Labor Act and the NLRB, [2] Securing Representative Status, [3] Restraint and Coercion of Employee Rights to Organize, [4] The Legality of Concerted Activity, [5] The Balance of Economic Weapons, [6] The Duty to Bargain in Good Faith with the Majority Representative, [7] Enforcement of the Collective Bargaining Agreement, [8] The Union and the Individual Employee, [and 9] Regulatory Conflict and Accommodation."

"Traditional" labor law, as that term is used herein, focuses upon various federal statutes, including the National Labor Relations Act, the Labor Management Relations Act, the Labor Management Reporting and Disclosure Act of 1959, the Norris-LaGuardia Act, and the Railway Labor Act. A single-volume treatise on this subject is needed, although much of the currently developing labor-oriented law is outside the so-called "traditional" arena of labor law practice. Many of the "labor" cases recently decided by the Supreme Court have concerned Title VII of the Civil Rights Act of 1964 and related civil rights statutes, public employment labor relations, or constitutional rights issues.

Professor Gorman's text weaves into the fabric of established law some of the most recent developments and is in some instances suggestive of developing trends. There are, however, at least two major areas related to "traditional" labor law that deserved more expansive treatment in Gorman's book.

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First, the increasingly important developments in public sector labor relations are ignored. While some attention is given to National Emergency Disputes in Chapter Eighteen, public sector unionism could be nonexistent for all the coverage it is given. The attorney who practices in public sector labor relations must inevitably draw from private sector precedent for its persuasive, if not binding, application. To that extent, Professor Gorman's book can be of considerable assistance to labor relations attorneys who practice in the public sector. The National Labor Relations Act has frequently provided the principal model for legislative draftsmen developing state statutes governing public employee bargaining. While the new developments in the public sector certainly are not traditional areas of practice for the labor lawyer, public sector labor relations so closely track the private experience that some reference to the phenomenon seems desirable and appropriate in a volume on contemporary labor law.

Second, recent developments have clearly indicated that constitutional considerations are becoming much more important to the labor practitioner, the National Labor Relations Board, and the courts. Undoubtedly, Professor Gorman could have provided the reader with a great deal more of his insightful analysis of constitutional trends, but he has declined to do so in this treatise.

Nevertheless, the author deliberately restricted the coverage of the volume to traditional federal labor law, precluding by design any treatment of federal or state laws on public sector unionism and collective bargaining. Similarly, by his own stated disclaimer, Professor Gorman refrained from "venturing a great number of personal appraisals of the soundness of Board and Court rules and decisions." The occasional deviations from that self-imposed restraint clearly indicate that the author has done much more perceptive thinking on current and prospective labor law trends than he was willing to share with the readers of this particular work.

There are some potential problems with the technique composition of references. Despite the author's protestations against references to authorities in the text, both practitioners and students may find the absence of complete citations in text or footnotes somewhat annoying. The citations that do appear in the text provide only the name of the case, the year of the decision, and the decisionmaker. Professor Gorman suggests that more detailed elements of citations may be ascertained simply by reference to the alphabetical table of cases at the back of the volume. Perhaps Professor Gorman is correct in his conclusion that the book will be much more readable without distracting citations and footnotes. No doubt, the reader will find that the stripped-down citations in the text provide the path of least resistance for the reader. What is gained from this readable style and the compactness of the volume, however, results in a slight compromise of the book's utility as a handy reference tool.

In addition to the table of cases, the book is helpfully supplemented by appendices, including the texts of the Sherman Act, Clayton Act, the Norris-LaGuardia Act, the National Labor Relations Act, and the Labor Management Relations Act. Official NLRB forms for election petitions and unfair labor practice charges are also exhibited. A particularly good feature is the selected bibliographies, keyed to chapter subjects.

All things considered, the new *Basic Text On Labor Law: Unionization and Collective Bargaining* is a valuable contribution to the body of literature on the subject. The writing style is lucid and precise, and presents the subject in a readable fashion. It is highly recommended to law students, law libraries, and practitioners.

THE PLAINTIFF'S PERSONAL INJURY CASE: ITS PREPARATION, TRIAL AND SETTLEMENT

By John A. DeMay
Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1977
Pp. 297 $24.95

*E.C. Stuart, Jr.**

With *The Plaintiff's Personal Injury Case: Its Preparation, Trial and Settlement*, John A. DeMay has attempted to prepare a standard desk reference for the handling of personal injury suits from the plaintiff's perspective. The material is divided into three major sections dealing with preparation of the case, trial, and settlement.

In the first part of the book the author observes that trial preparation is "hard work, immediately unrewarding, colorless and necessary."[1] Some of the important steps of trial preparation discussed in this section include the first meeting with the client, investigation, collecting data for trial, filing the lawsuit, and discovery.

The all-too common and forever disliked "nuisance claim" is the subject of constant discussion by trial lawyers, including Mr. DeMay. His suggestion that the attorney should charge no fee in this type case is somewhat confusing, since he also recommends, in an earlier chapter, that "such cases be accepted, that they be handled diligently, and that the goal be a prompt settlement on as favorable terms as possible."[2] Such discrepancies cloud the author's position.

The chapter devoted to discovery includes such subjects as oral depositions, depositions by written interrogatories, requests for production of documents, and requests for admissions. Although the chapter does contain useful information, the author seems to go somewhat astray from the intended purposes of the book by using too many forms. The request for admissions is a valuable weapon in the arsenal of every trial lawyer, yet Mr. DeMay devotes only two paragraphs to this subject and begins the discussion by saying, "This is a discovery tool which really isn't used very often."[3] The use of more practical observations and suggested techniques together with the citation of authoritative sources would enhance the value of this chapter.

The author devotes the second part of his book to trial technique and procedure. Pretrial preparation, selecting the jury, making a good opening address, direct and cross-examination, and delivering the closing address are some of the topics discussed in this section. The importance of putting on proof in a manner that will be well received and understood by the jury is stressed. The author tells of a bitter lesson he learned in a case involving expert medical testimony. After a defense verdict had been returned, Mr. DeMay talked with a colleague to inquire what had gone wrong. He was told, "You understood the doctor; he understood you, but the jury didn't understand either of you."[4]

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[1] J. DEMAY, THE PLAINTIFF'S PERSONAL INJURY CASE: ITS PREPARATION, TRIAL AND SETTLEMENT 6 (1977).

[2] *Id.* at 29.

[3] *Id.* at 109.

In the past, lawyers have been guilty of putting too much emphasis on proving the liability aspect of their case and not placing enough emphasis on proof of damages. The field of damages has become much more complex in recent years because of the tendency of the courts to keep pace with the economic and social growth of our country. Most lawyers will agree that the use of demonstrative evidence is an invaluable tool when arguing damages in a jury trial. Surprisingly enough, Dr. DeMay devotes only one page of his book to demonstrative evidence.

Although lawyers spend many hours preparing for trial, it is generally agreed that too little time is spent learning and applying the techniques involved in effecting a good settlement for the client. It has been said that only five percent of all personal injury cases ever reach the trial stage. Therefore, logic dictates that the trial lawyer should place more emphasis on the preparation of a case for settlement.

Mr. DeMay devotes a considerable portion of his book to settlement. He places the trial and the settlement in perspective as follows: "While you may love a trial, your partners and your wife love settlements. Trials are fun and bring fame, settlements pay the bills."[5]

The author also discusses the art of advocacy for the injured plaintiff with the insurance industry. A proper understanding of the chain of command in the insurance industry, the problems of the industry, gathering and submitting data, how to handle your client in the negotiations, guides to arriving at the proper area of settlement, and techniques on negotiating the settlement with your adversary are covered in the ensuing chapters. Mr. DeMay's approach to effective settlement is, without question, his most important contribution in this book.

The author's goal in writing this work is to help plaintiffs' attorneys prepare a case thoroughly, to suggest ideas about the manner in which a case should be tried, and to provide effective techniques in arriving at good settlements. The book is designed to serve as a starting point for the ambitious attorney seeking to become proficient in the handling of personal injury cases as well as a refresher for the more experienced attorneys. Despite the difficulties in writing a book covering such a vast area of practice, John A. DeMay has made a positive contribution that provides enjoyable and informative reading for the plaintiff's lawyer.

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[4] *Id.* at 183.

[5] *Id.* at 250.

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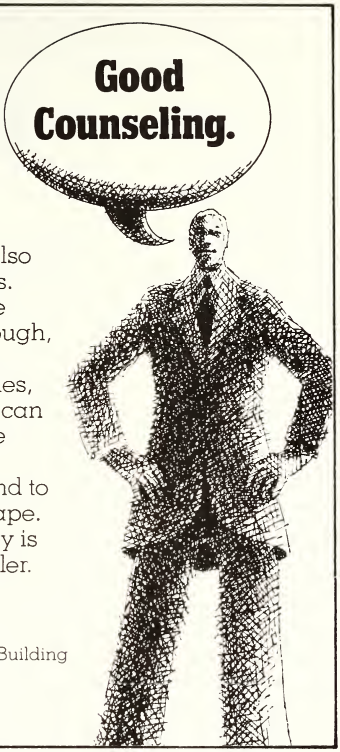
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